TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 328

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ALABAMA ASPHALTIC LIMESTONE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 31, 1941
CERTIORARI GRANTED OCTOBER 13, 1941

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No. 9569.

(ALABAMA CASE).

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TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals
FIFTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ALABAMA ASPHALTIC LIMESTONE COMPANY,
Respondent.

ON PETITION TO REVIEW THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

DOCKET NO. 91793

ALABAMA ASPHALTIC LIMESTONE COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

APPEARANCES:

For Taxpayer: James A. O'Callaghan.
For-Comm'r.: Hartford Allen, Esq.,
C. R. Marshall, Esq.

DOCKET ENTRIES

1937

Dec. 31—Petition received and filed. Taxpayer notified. (Fee not paid).

Dec. 31—Notice of appearance of V. J. Nesbit as counsel for taxpayer, filed.

1938

Jan. 4—Fee paid (check).

Jan. 4—Copy of petition served on General Counsel.

Feb. 28—Answer filed by General Counsel.

Feb. 28—Request for circuit hearing in Birmingham, Alabama, filed by General Counsel.

Mar. 7—Notice issued placing proceeding on Birmingham, Calendar. Answer and request served.

Dec. 16—Hearing set week of 2/13/38, Birmingham, Ala.

1939

Feb. 13-14—Hearing had before Mr. Hill, Div. 2, on the merits. Submitted. Motion for leave to amend

petition, granted. Amended petition and amended answer filed at hearing. Stipulation of facts, and appearance of James A. O'Callaghan, filed at hearing. Pet's brief due 3/16/39; Respondent's Memorandum filed at hearing. Respondent's reply due 3/31/39.

Feb. 18—Copy of motion and amended petition served on General Counsel.

Feb. 27—Transcript of hearing of Feb. 13 and 14, 1939, filed.

Mar. 13—Motion for extension to April 12, 1939 to file brief, filed by taxpayer. 3/13/39 granted.

Apr. 12—Brief filed by taxpayer. 4/12/39 copy served on General Counsel.

Apr. 26—Reply brief filed by General Counsel.

May 1—Stipulation for extension to May 31, 1939 for petitioner to file reply brief.

May 2—Order that petitioner is granted to May 31, 1939 to file a reply brief, entered.

May 16—Reply brief filed by taxpayer. 5/17/39 copy served on General Counsel.

1940

Feb. 14—Findings of fact and opinion promulgated. Sam B. Hill, Div. 2. Decision will be entered under Rule 50.

Feb. 29—Computation of deficiency filed by General Counsel.

Mar. 4—Hearing set March 20, 1940, on settlement.

Mar. 9—Consent to settlement filed by taxpayer.

Mar. 13—Decision entered, Sam B. Hill, Div. 2.

May 13—Petition for review by United States Circuit Court of Appeals, Fifth Circuit, with assignments of error filed by General Counsel.

May 21—Proof of service filed by General Counsel. (2).

May 22—Statement of evidence lodged.

May 22—Praecipe for record filed by General Counsel.

May 24—Proof of service of filing petition for review filed by General Counsel (1).

May 27—Proof of service of filing praecipe for record filed by General Counsel.

May 27—Notice of lodgment of statement of evidence and of hearing June 5, 1940, to approve statement of evidence filed by General Counsel, with proof of service thereon.

June 5—Hearing had before Mr. Hill, Div. 2, on approval of statement of evidence. Statement approved.

June 5—Statement of evidence approved and ordered filed.

Received Dec. 31 1937
U. S. Board of Tax Appeals

United States Board of Tax Appeals
Filed Dec 31 1937

UNITED STATES BOARD OF TAX APPEALS

ALABAMA ASPHALTIC LIMESTONE COMPANY, Petitioner, VS. COMMISSIONER OF INTERNAL REVENUE, Respondent.	91793 Docket No. IT:C 7 HGMcL

PETITION

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:C-7 HGMcL dated October 7, 1937, and as a basis of this proceeding alleges as follows:

(1) The Petitioner is a Corporation with its principal office in the Liberty National Life Building, Birmingham, Alabama.

(2) A notice of deficiency, a copy of which is hereto attached and marked "Exhibit A", was mailed to the Petitioner on October 7, 1937.

(3) The taxes in controversy are Income Taxes for the calendar year ending December 31, 1934, and in the sum of $2,236.56.

(4) The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The determination by the Commissioner of Internal Revenue that the contention of Petitioner that the transactions from the time the assets were owned by the Alabama Rock Asphalt, Inc. to the time the shares of its stock were distrib-

uted to former creditors of that Company are to be taken together and as so taken, constitute a reorganization as the result of which the gain or loss, depreciation and depletion of the property in the hands of the tax payer is the same as in the hands of the old Company, is denied for the reason that it is held by the Bureau that the transfer of these assets was a sale and not an exchange subject to reorganization provisions and the basis of gain or loss, depreciation and depletion is the price for which the property was bid at the Receiver's sale.

(b) The redetermination by the Bureau that the transfer of the assets of the Alabama Rock Asphalt, Inc. to the Alabama Asphaltic Limestone Company did not constitute a reorganization but was in fact a sale of the assets of the Alabama Rock Asphalt, Inc. to the Alabama Asphaltic Limestone Company, and, therefore, depreciation and depletion must be based upon the sales price rather than upon the cost, less depreciation and depletion in the hands of the Alabama Rock Asphalt, Inc.

(c) The determination of the Bureau that there was no reorganization of the Alabama Rock Asphalt, Inc. and that, therefore, depreciation and depletion must be based upon the apparent cost of the property paid by the Alabama Asphaltic Limestone Company.

(d) The fact that the Commissioner of Internal Revenue has determined that the acquisition of the property of the Alabama Rock Asphalt, Inc. by the Alabama Asphaltic Limestone Company did not constitute a reorganization but was in fact a sale.

(5) The facts upon which the Petitioner relies as the basis of this proceeding are as follows:

The Alabama Rock Asphalt, Inc., predecessor in title and interest of Petitioner, was incorporated

on January 12, 1927, with an authorized capital stock of 6500 shares without nominal or par value which corporation began business with 20 (Twenty) shares paid in. In 1927, the Deep Water Coal & Iron Corporation, the former owner of the Alabama Asphaltic Limestone Company properties transferred to the Alabama Rock Asphalt, Inc. the property now owned by your Petitioner, Alabama Asphaltic Limestone Company, for which there was issued to Deep Water Coal & Iron Company 6480 shares of its capital stock, being all of the capital stock authorized to be issued by the Alabama Rock Asphalt, Inc. This property was carried on the books of the Alabama Rock Asphalt, Inc. at the same price as on the books of the Deep Water Coal & Iron Company, that is, approximately $200,000.00. No other stock, either common or preferred, was ever issued by the Alabama Rock Asphalt, Inc., predecessor in title and interest to your Petitioner.

Following the organization of the Alabama Rock Asphalt, Inc. and the acquisition by it of the real estate hereinabove noted, a group of the stockholders of the Deep Water Coal & Iron Company advanced to the Alabama Rock Asphalt, Inc. monies for the development of the property and for the purchase of machinery and other equipment, taking notes as evidence thereof. These advances continued until about 1930. It was agreed between the note holders of the Alabama Rock Asphalt, Inc. that they would accept stock to be issued by the Alabama Rock Asphalt, Inc. in lieu of and in payment of the notes held by them evidencing money advanced by them for the purchase of machinery and equipment and the development of the property of Alabama Rock Asphalt, Inc.

In September, 1930, there had been advanced to the Alabama Rock Asphalt, Inc. $802,359.21 and notes had been issued evidencing these advances. Subsequent to the issuance of the notes by

the Alabama Rock Asphalt, Inc., two of such notes before maturity came into the hands of Edward Roos and Frank Terrace without notice of any agreement to accept stock in payment of said notes. In October, 1930, the Deep Water Coal & Iron Corporation, the holder of all of the capital stock issued and outstanding of the Alabama Rock Asphalt, Inc., was itself declared a bankrupt. The original holders of the notes of the Alabama Rock Asphalt, Inc. were all substantial stockholders of the Deep Water Coal & Iron Corporation. The note holders of the Alabama Rock Asphalt, Inc. had all agreed to accept shares of the capital stock of the Alabama Rock Asphalt, Inc. in payment for notes held by them except Edward Roos and Frank Terrace, who were both innocent holders for value and without notice, in the sum of $64,100.65. They refused to accept the stock of the Alabama Asphalt, Inc. in the amount of the notes held by them, not being a party to the original agreement so to do and refused to join in the plan of reorganization. A copy of this plan of reorganization is hereto attached and made a part hereof.

Following the filing of the bankruptcy petition on September 11, 1930, a Receiver was appointed on September 12, 1930, and the Alabama Rock Asphalt, Inc. was adjudicated a bankrupt on September 17, 1930. Following this adjudication, Wallace L. Caldwell was duly elected Trustee and such election was confirmed by the Referee to whom the case had been referred. The Trustee petitioned the Referee for an order authorizing the sale of the properties of the bankrupt. For the purpose of this sale, an upset price of $150,000.00 was set and this figure was arrived at after consulting the Referee in order that his fee as such Referee might be based on a figure that was satisfactory to him and also to determine the amount to be received by the non-consenting note holders. The note holders who agreed to the upset price

were the original note holders who had advanced the money for the purchase of machinery and equipment and development of the property as set forth above and who had agreed to accept stock of the Alabama Rock Asphalt, Inc., the predecessor in title and interest to the Petitioner.

The Alabama Asphaltic Limestone Company was organized to take title to the properties of the Alabama Rock Asphalt, Inc, following the sale of such properties to the note holders and this was done and the stock of the Alabama Asphaltic Limestone Company was issued to the note holders of the Alabama Rock Asphalt, Inc. in accordance with the amount such notes bore to the entire indebtedness. There were also a few creditors outside of the note holders and they all came in on the plan of reorganization, accepting stock of the Company in liquidation of such indebtedness. Wallace L. Caldwell, at the time he accepted the position as President of the Alabama Rock Asphalt, Inc. in June, 1927, was told by the officers of the Alabama Rock Asphalt, Inc. and by the President of the Deep Water Coal & Iron Company that stock would be issued to the note holders of the Alabama Rock Asphalt, Inc. in payment of such notes. He had objected to the outstanding liabilities of the Alabama Rock Asphalt, Inc. and was told that for the notes outstanding, stock would be issued in payment therefor in accordance with agreements of all stockholders. As noted, two of the note holders became such by purchasing the notes of the Alabama Rock Asphalt, Inc. before maturity and for value and without notice of the agreement between the note holders and were, therefore, innocent note holders and were not bound by any agreement between the other note holders and refused to come into the reorganization.

WHEREFORE, Petitioner prays that this Board

hear the proceedings and decree and determine that the acquisition by the Alabama Asphaltic Limestone Company of the properties of the Alabama Rock Asphalt, Inc. was by way of reorganization and not through a purchase and sale of all of the properties of the Alabama Rock Asphalt, Inc. and that the basis of depreciation and depletion as claimed by the Alabama Asphaltic Limestone Company be continued on the same basis as used by the Alabama Rock Asphalt, Inc. and not upon the basis of a purchase as determined by the Commissioner of Internal Revenue.

ALABAMA ASPHALTIC LIMESTONE COMPANY

By Wallace L. Caldwell
Its President

(SEAL)

STATE OF ALABAMA }
COUNTY OF JEFFERSON }

Wallace L. Caldwell, being duly sworn, says that he is President of the Alabama Asphaltic Limestone Company, the Petitioner herein, and that as such officer is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

Wallace L. Caldwell

Subscribed and sworn to before me this 28th day of December, 1937.

Virginia S. Hovatter
Notary Public

My commission expires Nov. 7th, 1938

(SEAL)

EXHIBIT A

STATEMENT

IT:C:7
HGMcL:90D

In re: Alabama Asphaltic Limestone Company,
Liberty National Bank Building,
Birmingham, Alabama.

Tax Liability for Taxable Year Ended
December 31, 1934.

	Liability	Assessed	Deficiency
Income Tax	$6,756.11	$4,519.55	$2,236.56

Careful consideration has been given to your protest dated March 17, 1936 in connection with the report of the internal revenue agent in charge, and information submitted at a conference held in this office on May 12, 1937. Your contention that all of the transactions from the time the assets were owned by the Alabama Rock Asphalt Company to the time the shares of its stock were distributed to the former creditors of that company are to be taken together and as so taken together constitute a reorganization as the result of which the gain or loss, depreciation and depletion of the property in the hands of the taxpayer is the same as in the hands of the old company is denied for the reason that it is held by the Bureau that the transfer of these assets was a sale and not an exchange subject to reorganization provisions and that the basis of gain or loss, depreciation and depletion is the price for which the property was bid at the receiver's sale. See U. S. v. Galveston-Houston Electric Company, 1936, Circuit Court of Appeals 1st District, 84 Fed. (2) 516 affirming District Court, Newberry Lumber and Chemical Company, 33 B. T. A. 150; S. B. Luttrell v. U. S., District Court, 34 Fed. (2d) 563.

A copy of this letter, together with a copy of the statement and schedules, has been mailed to your representative, Mr. V. J. Nesbit, 1115 Webb Crawford Building, Birmingham, Alabama, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

HGMcL/LMU-3

EXHIBIT B

ALABAMA ROCK ASPHALT, INC.
REORGANIZATION COMMITTEE

New York, November 29, 1930.

To the Creditors of
Alabama Rock Asphalt, Inc.:

Dear Sir:

Alabama Rock Asphalt, Inc., having been adjudicated a bankrupt, the undersigned have been requested by creditors representing approximately 85% of the total indebtedness of the corporation to act as a committee (without compensation) for the preparation of a plan of reorganization. In view of the depressed conditions prevailing which have been felt acutely in Alabama, it is to be expected that a forced sale of the properties will result in creditors receiving but a small percentage of the amount of their claim. The balance sheet of the Trustee in Bankruptcy as of September 11, 1930, showed $844,788.47 due creditors and noteholders, while the properties and other assets of the company have been appraised at $155,876.52 by three appraisers appointed by the court.

The development of the company in the past has been hampered by lack of funds and an unusually severe business depression. Nevertheless, substantial progress has been made and it is believed that if reorganized on a basis which will relieve the company of its heavy present indebtedness it will be in excellent position to take advantage of any revival in business and with the return of normal times should be able to operate on a profitable basis. An important highway program in the south is proposed for 1931 and has to a large extent been definitely arranged for. A number of states, counties and municipalities have voted substantial bond issues while others are expected to do so in the near future. Highway construction in the territory which the company serves, is, therefore, likely to be much greater in the coming year than it has been for some years past, and a volume of

business materially larger than that of previous years should be available to the company in 1931 if a prompt reorganization puts it in a position to properly compete for this business.

The attached plan of reorganization treats all creditors equally and replacing the present indebtedness of the company by preferred and common stock will leave the company in a sound financial position which should enable it to handle its business on a more economical basis than has been the case in the past.

In order to make such a reorganization possible, however, the unanimous consent of all creditors will be required. Otherwise the only alternative will be a forced sale of the assets which we are informed may result in creditors receiving 15 cents or less on the dollar.

In view of the fact that only through a reorganization will it be possible for creditors to protect their interest in the corporation and avoid the large loss which will otherwise result from a foreclosure sale, we urge the prompt acceptance of the enclosed plan and have attached hereto a form of assent which we would ask you to sign and send as soon as possible to the undersigned.

Very truly yours,

George B. Agnew,
Walter L. Douglas,
John J. Rudolf,
James R. Sloane,

ALABAMA ROCK ASPHALT, INC.
Reorganization Committee.

Eugene F. E. Jung,
Secretary for the Committee,
40 Wall Street,
New York City.

REORGANIZATION PLAN

ALABAMA ROCK ASPHALT, INC.

A new company with the name of Alabama Asphaltic Limestone Company or some other appropriate name, will be organized under the laws of the State of Alabama to bid in at foreclosure sale all the business, property and assets of Alabama Rock Asphalt, Inc. The authorized capitalization will consist of—

10,000 shares Preferred Stock without par value;
10,000 shares Common Stock without par value.

The preferred stock will be entitled to receive cumulative dividends at the rate of $7 per annum, will be callable at $110 and accrued dividends and its retirement will be provided for by an annual sinking fund. It will not be entitled to vote, except as otherwise provided by Statute, the common stock having the exclusive voting power.

Preferred and common stock of the new corporation will be issued to creditors of the present Alabama Rock Asphalt, Inc., on the basis of one share of preferred and one share of common for each $100 of indebtedness due them by Alabama Rock Asphalt, Inc., which would require approximately 8,300 shares of preferred stock and 8,300 shares of common stock. The balance of the capital stock will remain in the treasury of the new company to be available for future needs.

Attached is a pro forma balance sheet showing the approximate position of the company giving effect to the reorganization plan. The realty of the company consists of 250 acres of land in Mississippi and 715 acres of land in Colbert County, Alabama, of which, we are informed, 250 acres are workable. There are on the property buildings, machinery and equipment constituting a hot mix asphaltic products plant. In view of the difficulty in establishing valuations for these fixed assets, they have

been included in the balance sheet at the values placed on them by the appraisers appointed by the Referee in bankruptcy.

ALABAMA ROCK ASPHALT, INC.
Reorganization Committee.

November 29, 1930.

ALABAMA ASPHALTIC LIMESTONE COMPANY

Successor to

ALABAMA ROCK ASPHALT, INC.

Pro Forma Balance Sheet

Giving effect to reorganization outlined in attached plan and giving effect to values established, as of September 11, 1930, by appraisers appointed by Referee in Bankruptcy, the balance sheet will be approximately as follows:

ASSETS

Current Assets:		
Cash on hand and in banks	$ 801.11	
Accounts Receivable	15,039.79	
Inventories	8,257.11	
Freight Claims Receivable	7,232.18	
Total Current Assets		$ 31,330.19
Capital Assets:		
Land	$ 19,184.50	
Buildings, Machinery and Equipment	105,361.87	
Total Capital Assets		124,546.37

Deferred Charges:		
Prepaid Taxes	$ 606.16	
Unexpired Insurance	198.96	
Supplies on hand	50.00	
Total Deferred Charges		855.12
Total Assets		$156,731.68

LIABILITIES

Current Liabilities:		
Accrued Property Taxes	$ 1,806.53	
Total Current Liabilities		$ 1,806.53
Capital Stock and Surplus:		
*8,300 Shares Preferred Stock—no par value		
*8,300 Shares Common Stock—no par value represented by	$154,925.15	
		154,925.15
Total Liabilities		$156,731.68

*Approximate number of shares to be issued.

Received Feb 28 1938
U. S. Board of Tax Appeals

United States Board of Tax Appeals
Filed Feb 28 1938

UNITED STATES BOARD OF TAX APPEALS

ALABAMA ASPHALTIC LIMESTONE COMPANY, Petitioner,
VS.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 91793.

ANSWER

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

(1) Admits the allegations in paragraph (1) of the petition.

(2) Admits the allegations in paragraph (2) of the petition.

(3) Admits the allegations in paragraph (3) of the petition.

(4) Denies that respondent's determination is based upon errors as alleged in subparagraphs (a) to (d) inclusive, of paragraph (4) of the petition.

(5) Denies the material allegations of fact contained in paragraph (5) of the petition and the subparagraphs thereunder.

Denies generally and specifically each and every allegation contained in the petition not hereinabove admitted, qualified or denied.

Wherefore, it is prayed that the Board redetermine

the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz., $2,236.56.

Signed J. P. Wenchel
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

OF COUNSEL:
F. R. SHEARER,
C. C. HOLMES,
Special Attorneys,
Bureau of Internal Revenue.

cch/bs 2/25/38

U. S. Board of Tax Appeals
Filed at Hearing Feb 13 1939

UNITED STATES BOARD OF TAX APPEALS

ALABAMA ASPHALTIC LIMESTONE COMPANY, Petitioner, VS. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 91793.

AMENDMENT TO THE PETITION

Pursuant to leave of the Board first had and obtained, the Petitioner hereby amends its Petition by inserting after the word "reorganization" at the end of the first paragraph on page eight of the Petition the following:

1. Error as to disallowance of bad debts. The Commissioner further erred in disallowing to the Petitioner a deduction for bad debts in the sum of $2,780.96, which

was ascertained to be worthless and written off by the Petitioner in the year of 1934. These items are as follows:

J. R. Copeland	$1,524.06
Morgan-Hill Paving Company	658.40
John T. Walsh	598.50
	$2,780.96.

The facts upon which these bad debts are claimed as a deduction are as follows: John R. Copeland represented the Petitioner as an agent on a commission basis. He had been employed by the predecessor company for some time prior to the reorganization of that company into the Petitioner. He continued as Petitioner's representative until the time of his death in 1934. The predecessor company had made advances to him which had been substantially reduced in 1930, so that at the date of the reorganization, on January 8, 1931, there was a balance of $2,704.67 due from him. In 1931 advances of $843.39 were made to him, and there was credited to him for commissions $2,074.00. During the year 1932 there were advanced to him $75.32, and $25.32 credited to him for commissions. In 1933 he made no sales nor were any advances made to him, but he still represented the Petitioner in certain territory up to the time of his death in 1934. His death was the result of an accident. After his death in 1934 there was no estate or property left by him out of which the indebtedness could be collected and the Petitioner wrote the balance, $1,524.06, off in that year.

The facts with reference to the Morgan-Hill Paving Company account are as follows: the balance due from this company was due prior to the reorganization, described in the original Petition. Between September 11, 1930, and the date of the reorganization, namely January 8, 1931, $500.00 was paid on account, leaving a balance due of $658.40 which was brought forward on the Petitioner's books at the time of the reorganization. The Morgan-Hill Paving Company went into bankruptcy and

its final liquidation did not take place until 1934, when the amount was written off as worthless by the Petitioner.

The John T. Walsh amount was the result of material shipped to him in 1929 by the predecessor company, Alabama Rock Asphalt, Inc. No payment was ever made on the account. The account was reduced to a judgment and carried for several years before being charged off. During this period Walsh was doing construction work and every effort was made to collect the judgment from him. After every effort to collect the judgment had been made, without results, the Petitioner determined in 1934 that it was uncollectible and therefore charged it off.

2. Claim as to overpayment of tax. The Petitioner filed its Income Tax Return for the calendar year 1934 in the office of the Collector of Internal Revenue for the District of Alabama at Birmingham, Alabama, on, to-wit, March 12, 1935, and showed a tax due of $4,519.55. This amount was paid by the Petitioner to the said Collector as follows:

March 12, 1935	$1,129.88
June 8, 1935	1,129.88
September 9, 1935	1,129.88
December 11, 1935	1,129.91
	$4,519.55

The ninety day deficiency notice in this case was mailed to the Petitioner on October 7, 1937. The original Petition to the Board was filed on, to-wit, December 28, 1937. Upon a redetermination of the tax by the Board, the petitioner believes that it will be found that the tax of, to-wit, $4,519.55 has been overpaid, and that all of the overpayment was collected from the petitioner within three years prior to the filing of the petition with the Board.

PRAYER FOR RELIEF

The Petitioner prays that the Board hear this proceeding and redetermine the tax in accordance with the

law and the evidence, and it further prays that the Board find and determine that there was an overpayment of tax in this case, and that such overpayment was made within three years prior to the filing of the Petition herein, and that the Board order that such amount of tax as it finds to have been overpaid be refunded to the Petitioner.

ALABAMA ASPHALTIC LIMESTONE COMPANY

By, Wallace L. Caldwell
President.

STATE OF ALABAMA }
COUNTY OF JEFFERSON }

Wallace L. Caldwell, being duly sworn, deposes and says that he is the President of the Alabama Asphaltic Limestone Company, the Petitioner in this case, and that as such President he is duly authorized to verify the foregoing Amendment to the Petition; that he is the same person who verified the original Petition filed herein, and that he knows the contents of same, as well as of the Amendment thereto, and that the facts alleged in the original Petition and in this Amendment to the Petition are true, and he further says that the Petition as amended is true in substance and in fact.

Wallace L. Caldwell

Subscribed and sworn to before me
this 11th day of February, 1939.

Virginia S. Wright
Notary Public.

The Petitioner attaches to this Amendment a complete copy of the ninety day letter issued in this case, and marks same "Exhibit A".

TREASURY DEPARTMENT
WASHINGTON

Oct—7 1937

Alabama Asphaltic Limestone Company,
Liberty National Life Building,
Birmingham, Alabama.

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934 discloses a deficiency of $2,236.56 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
Guy T. Helvering,
Commissioner.

By W. T. Sherwood
ACTING Deputy Commissioner.

Enclosures:
Statement
Form 870
Schedules 1 & 2
Exhibit A

STATEMENT

IT:C:7
HGMcL:90D

In re: Alabama Asphaltic Limestone Company,
Liberty National Bank Building,
Birmingham, Alabama

Tax Liability for Taxable Year Ended
December 31, 1934.

	Liability	Assessed	Deficiency
Income tax x	$6,756.11	$4,519.55	$2,236.56

Careful consideration has been given to your protest dated March 17, 1936 in connection with the report of the internal revenue agent in charge, and information submitted at a conference held in this office on May 12, 1937. Your contention that all of the transactions from the time the assets were owned by the Alabama Rock Asphalt Company to the time the shares of its stock were distributed to the former creditors of that company are to be taken together and as so taken together constitute a reorganization as the result of which the gain or loss, depreciation and depletion of the property in the hands of the taxpayer is the same as in the hands of the old company is denied for the reason that it is held by the Bureau that the transfer of these assets was a sale and not an exchange subject to reorganization provisions and that the basis of gain or loss, depreciation and depletion is the price for which the property was bid at the receiver's sale. See U. S. v. Galveston-Houston Electric Company, 1936, Circuit Court of Appeals 1st District, 84 Fed. (2) 516 affirming District Court, Newberry Lumber and Chemical Company, 33 B. T. A. 150, S. B. Luttrell v. U. S. District Court, 34 Fed. (2d) 563.

A copy of this letter, together with a copy of the statement and schedules, has been mailed to your representative, Mr. V. J. Nesbit, 1115 Webb Crawford Building, Birmingham, Alabama, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Alabama Asphaltic Limestone Company

Taxable Year Ended December 31, 1934.

Schedule 1

Adjustments to Net Income

Net income as disclosed by return		$ 32,869.48
As corrected		49,135.38
Net adjustment as computed below		$ 16,265.90
Unallowable deductions and additional income:		
(a) Depreciation	$ 8,107.92	
(b) Depletion	5,426.02	
(c) Bad debts and advances	2,780.96	
Total		$16,314.90
Additional deduction:		
(d) Federal capital stock tax		49.00
Net adjustment as above		$ 16,265.90

Schedule 1-A

Explanation of Items

(a) Depreciation adjustment:	
Amount deducted on books	$ 21,630.63
Correct amount allowable	13,522.71
Excessive amount restored to income	$ 8,107.92

For computation showing depreciation allowances see exhibit A.

(b) Depletion adjustment	
Amount deducted on return	$ 6,019.58
Correct amount allowable	593.56
Excessive amount restored to income	$ 5,426.02

COMPUTATION

Mergerum Asphaltic Mineral, cost January 8, 1931				$ 17,884.50
Recoverable reserves			1,788,450 tons	
Depletion rate per ton			$0.01 per ton	
Year	Tons	Rate Per ton	Depletion Allowed	Reserve December 31
Prior 1934	98,273	$ 0.01		$ 982.73
1934	59,356		$593.56	1,576.29

(c) Bad debts adjustment:

Bad debt in old company account	$1,256.90	
Advances made prior to Jahuary 8, 1931	1,524.06	
Restored to income	$2,780.96	

The above amount, representing two accounts is disallowed as a deduction from income for the reason that they were worthless prior to the date of the incorporation of your company.

(d) Federal capital stock tax:

Federal capital stock tax accrued December 31, 1934	$ 478.00
Federal capital stock tax accrued December 31, 1933	429.00
Difference allowed as a deduction in 1934	$ 49.00

Schedule 2

COMPUTATION OF TAX

Income tax

Net income for taxable year	$ 49,135.38
Income tax at 13 3/4%	$ 6,756.11
Total previously assessed, account #41322	4,519.55
Additional Income tax to be assessed	$ 2,236.56

EXHIBIT A

Depreciation Summary

Buildings, Machinery and Equipment—Computation on Basis of 10% per annum

Years	Corrected Balance Close of Year	Additions	1931	1932	1933	1934
Jan. 8, 1931		$105,000.00	$10,299.66	$10,500.00	$10,500.00	$10,500.00
1931		7,098.98	354.95	709.90	709.90	709.90
1932		8,758.09		437.90	875.81	875.81
1933	$130,317.06	9,459.99			523.00	946.00
1934	140,137.09	9,820.03				491.00
Totals			$10,654.61	$11,647.80	$12,608.71	$13,522.71
Amended Reserve			$10,654.61	$22,302.41	$34,911.12	$48,433.83
Depreciation allowed						$13,522.71
Depreciation claimed						21,630.63
Decrease						$ 8,107.92

IT:C:7
HGMcL:90D
Alabama Asphaltic Limestone Company

EXHIBIT A

Buildings and Equipment, December 31, 1934

	Balance January 1, 1934	Assets Additions	Balance December 31, 1934	Reserve for Depreciation Balance January 1, 1934	Reserve for Year	Balance December 31, 1934	Net Value
Buildings:							
Crusher	$ 21,788.69		$ 21,788.69	$ 3,340.30	$ 653.66	$ 3,993.96	$ 17,794.73
Pulverizer	13,213.29		13,213.29	1,981.94	396.37	2,378.31	10,834.98
Storage	26,333.01		26,330.01	8,953.22	789.99	9,743.21	16,589.80
Coldmix	1,023.19		1,023.19	61.00	30.69	91.69	931.50
General Plant	19,440.66		19,440.66	4,053.88	794.35	4,848.23	14,592.43
Village	34,351.87		34,351.87	10,078.79	1,889.17	11,967.96	22,383.91
	$ 116,150.71		$ 116,150.71	$ 28,469.13	$ 4,554.23	$ 33,023.36	$ 83,127.35
Machinery and Equipment:							
Stripping	$ 16,521.55		$ 16,521.55	$ 14,487.25	$ 297.67	$ 14,784.92	$ 1,736.63
Quarry	31,599.07	$ 6,513.27	38,112.34	18,538.30	1,897.52	20,435.82	17,676.52
Crushing	28,158.59		28,158.59	9,058.89	1,986.41	11,045.30	17,113.29
Pulverizing	24,602.86		24,602.86	9,718.77	2,339.38	12,058.15	12,544.71
Storage	5,834.38		5,834.38	1,326.59	524.41	1,851.00	3,983.38
Haulage	60,765.64		60,765.64	24,055.15	5,060.04	29,115.19	31,650.45
Coldmix	5,805.34	642.53	6,447.87	1,199.48	530.53	1,730.01	4,717.86
General Plant	63,577.61		63,577.61	22,263.02	4,063.50	26,326.52	37,251.09
Commissary	1,699.07		1,699.07	254.73	84.91	339.64	1,359.43
	$ 238,564.11	$ 7,155.80	$ 245,719.91	$ 100,902.18	$ 16,784.37	$ 117,686.55	$ 128,033.36
Birmingham Office:							
Furniture and Fixtures	$ 5,537.69	$ 265.00	$ 5,802.69	$ 781.57	$ 292.03	$ 1,073.60	$ 4,729.09
Laboratory		2,399.23	2,399.23				2,399.23
	$ 5,537.69	$ 2,664.23	$ 8,201.92	$ 781.57	$ 292.03	$ 1,073.60	$ 7,128.32
Quarry Face	8,000.00		8,000.00				8,000.00
Total Assets	$ 368,252.51	$ 9,820.03	$ 378,072.54				
Reserve for Depreciation				$ 130,152.88	$ 21,630.63	$ 151,783.51	$ 226,289.03

U. S. Board of Tax Appeals
Filed at Hearing Feb 14 1939

UNITED STATES BOARD OF TAX APPEALS

ALABAMA ASPHALTIC LIMESTONE COMPANY, Petitioner, VS. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 91793.

ANSWER TO AMENDMENT TO THE PETITION

NOW comes the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to the petition in the above-entitled proceeding, denies as follows:

1. Denies the allegations of paragraph 1 appearing on pages 1, 2 and 3 of the amendment to the petition.

2. Denies the allegations of paragraph 2 appearing on page 3 of the amendment to the petition.

3. Denies generally each and every allegation of the amendment to the petition not hereinabove specifically denied.

WHEREFORE, it is prayed that the petition as amended be denied.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

OF COUNSEL:

HARTFORD ALLEN,
Special Attorney,
Bureau of Internal Revenue.

U. S. Board of Tax Appeals
Filed at Hearing Feb 14 1939

UNITED STATES BOARD OF TAX APPEALS

ALABAMA ASPHALTIC LIMESTONE COMPANY, Petitioner,
VS.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 91793.

STIPULATION OF FACTS

It is hereby stipulated by and between the parties hereto, through their respective attorneys, without prejudice to the right of the parties to introduce additional and further evidence, that the following facts may be accepted by the Board for the purpose of this case as true:

(1) The petitioner is a corporation, organized under the laws of the State of Alabama on January 19, 1931, with its principal office and place of business located in Birmingham, Alabama. It filed its income tax return for the year 1934 with the Collector of Internal Revenue for the District of Alabama at Birmingham, Alabama.

(2) On January 12, 1927 the Alabama Rock Asphalt, Inc. was organized under the laws of the State of Alabama, with an authorized capital of 6,500 shares, no par, common stock, 20 shares of which was subscribed for in cash. The Deepwater Coal & Iron Corporation, of Jasper, Alabama, subscribed for the remaining 6,480 shares of its capital stock, transferring therefor property which cost the said Deepwater Coal & Iron Corporation $208,901.76.

(3) After the organization of Alabama Rock Asphalt, Inc. certain persons advanced various sums of money to the corporation and took therefor unsecured, interest bearing (7%) notes. The names of these persons

and the details with respect to the notes are set forth in a schedule, introduced in evidence as Exhibit 1.

(4) On September 11, 1930 a Petition in Bankruptcy with respect to the Alabama Rock Asphalt, Inc. was filed with the United States District Court for the Southern Division of the Northern District of Alabama, a copy of which is introduced in evidence as Exhibit 2.

(5) On September 11, 1930 a Petition for a Receiver was filed with the aforesaid court. The Petition for a Receiver contains the following language:

> "We, the undersigned creditors of the bankrupt, holding unsecured claims in the amounts set opposite our names, do hereby join in the annexed and aforegoing Petition, and do nominate Wallace L. Caldwell, of the City of Birmingham, Alabama, in said District, their Receiver, he being a proper, fit and suitable person therefor.
>
> "Dated this 10th day of September, 1930.

"Stadacona Corporation
By V. J. Nesbit, Atty.
$77,565.87
Walter Douglas
By V. J. Nesbit, Atty.
$43,079.73
L. R. Hardenbergh
By V. J. Nesbit, Atty.
$12,056.00

Roberts & Son
by Jas. G. Smith, Prest.
$203,17
R. A. Brown & Co., Inc.
by J. L. Orr, Vice-Pres.
$1,439.90
Crandall Engr. Co., Inc.
by E. A. Crandall, Pres.
$38.48
A. Iselin & Co.
by V. J. Nesbit, Atty.
$238,123.84
J. J. Rudolf
by V. J. Nesbit, Atty.
$6,415.34."

(6) The Schedule of Debts of the Alabama Rock Asphalt, Inc., Bankrupt, as of September 11, 1930, included the notes referred to hereinabove, and were designa-

ted in said schedule as, "Long-Term Notes with Interest Accrued to September 11, 1930".

(7) On October 1, 1930 a Creditor's Appointment of Trustee was issued by the Referee in Bankruptcy. A copy of the Creditor's Appointment of Trustee is introduced in evidence as Exhibit 3.

(8) The Balance Sheet of the Alabama Rock Asphalt, Inc., as of December 31, 1930, as shown by the books, is introduced in evidence as Exhibit 4.

(9) An Appraisal of the Assets of the Bankrupt was made and filed, and shows the following:

"250 Acres in Mississippi, at $5.00	$ 1,300.00
715 " " Alabama, (Colbert County) at $25.00	17,884.50
Buildings, Machinery & Equipment	105,361.87
Supplies	2,377.13
Commissary stock	1,879.98
Cash	801.11
Freight Claims	7,232.18
Advanced Rock in Process	4,000.00
Accounts Receivable	15,039.75
TOTAL	$155,876.52"

(10) On December 6, 1930 a "Petition of Trustee for Sale of Property of Bankrupt" was filed. A copy of said Petition is introduced in evidence as Exhibit 5.

(11) During the year 1930 certain correspondence took place between the President of the Alabama Rock Asphalt, Inc. and others. Copies of the correspondence are introduced in evidence as Exhibit 6.

(12) On January 9, 1931 the "Trustee's Report of Sale of Assets of Bankrupt" was filed, and on the same date the "Order of Referee Confirming Sale of Assets by Trustee" was issued, copies of which are introduced in evidence as Exhibit 7.

(13) After the acquisition of the assets, as set forth in Exhibit 7, and on or about January 19, 1931 said assets were transferred to the Alabama Asphaltic Limestone Company, Birmingham, Alabama, petitioner herein.

(14) Common and preferred stock (in equal proportions) was thereupon issued in the amount and in the manner set forth in a schedule which is introduced in evidence as Exhibit 8.

(15) The opening balance sheet of the Alabama Asphaltic Limestone Company, petitioner, as of January 19, 1931, as shown by the books, is set forth in a schedule which is introduced in evidence as Exhibit 9.

(16) In the event the Board should hold that the petitioner is entitled to use the asset basis of the Alabama Rock Asphalt, Inc., then the amount of depreciation and depletion allowable as deductions from gross income for the year 1934 are $21,630.63 and $6,019.58, respectively.

(17) In the event the Board should hold that the petitioner is not entitled to use the asset basis of the Alabama Rock Asphalt, Inc., the deductions from gross income for the year 1934 for depreciation and depletion as allowed in the deficiency notice, viz: $13,522.71 and $593,56, respectively, are correct.

(18) It is further stipulated that the petitioner is entitled to a deduction from gross income for the year 1934 in the amount of $1,200.00, representing debts ascertained to be worthless and charged off during said year.

James A. O'Callaghan,
Counsel for Petitioner

J. P. Wenchel
Chief Counsel
Bureau of Internal Revenue,
Counsel for Respondent.

UNITED STATES BOARD OF TAX APPEALS

ALABAMA ASPHALTIC LIMESTONE COMPANY, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 91793. Promulgated February 14, 1940.

REORGANIZATION.—In 1930 the holders of unsecured notes of an insolvent corporation caused a proceeding in bankruptcy to be instituted against the corporation pursuant to a plan of reorganization, assented to by all of its creditors except two of the noteholders and a few open account creditors. Such plan provided for the organization of a new corporation, the petitioner, to acquire the business and assets of the bankrupt. The property of the old corporation was duly sold by the trustee in bankruptcy to a committee representing all of the noteholders (except the two dissenters) and immediately transferred to the newly organized corporation in exchange for all of its capital stock, which was distributed among the assenting creditors, proportionately to their claims against the old corporation, in satisfaction of such claims. Held, (1) that the transaction constituted a reorganization within the meaning of section 112 (i) (1) (A), Revenue Act of 1928; and (2) that petitioner is entitled to compute deductions for depreciation and depletion for the taxable year 1934 on the basis of the assets in the hands of the old corporation.

James A. O'Callaghan, Esq., for the petitioner.
Hartford Allen, Esq., for the respondent.

Respondent determined a deficiency in petitioner's income tax liability for the calendar year 1934 in the amount of $2,236.56, from which petitioner appeals and

assigns as error, (1) the action of respondent in treating the transaction involved herein as a sale by the trustee in bankruptcy, rather than as a reorganization, for the purpose of determining the proper basis for depreciation and depletion; and (2) the action of respondent in disallowing a bad debt deduction claimed by petitioner. The parties stipulated at the hearing the amount properly allowable as a deduction for bad debts.

FINDINGS OF FACT.

Petitioner is an Alabama corporation, organized January 19, 1931, with its principal office and place of business at Birmingham.

Alabama Rock Asphalt, Inc., sometimes hereinafter called the predecessor or old corporation, was an Alabama corporation organized January 12, 1927, with an authorized capital of 6,500 shares no par common stock, 20 shares of which were subscribed for in cash. The Deep Water Coal & Iron Corporation, hereinafter called the Deep Water Corporation, subscribed for the remaining 6,480 shares of the old corporation's capital stock, transferring therefor property which cost the Deep Water Corporation $208,901.76.

After the old corporation had been formed, it had no working capital or funds with which to erect buildings, purchase machinery and equipment, and carry on its business. To provide such funds, individual stockholders of the Deep Water Corporation loaned the old corporation $400,000 cash, and additional funds were put up from time to time so that between the dates of February 1, 1927, and August 1, 1929, the total sum of $733,687.48 had been loaned or advanced to the old corporation.

These loans or advances were made by the stockholders of the Deep Water Corporation upon the express understanding that they would receive stock or securities of the old corporation for the respective amounts so advanced. The old corporation executed an unsecured interest-bearing (7 percent) note for each loan or advance-

ment, and all of such notes were made to mature on February 1, 1930, except a note dated January 14, 1929, for $80,000 issued in the name of the National Bank of Commerce in New York City. The date of maturity of this note was April 14, 1929. It was endorsed by the Deep Water Corporation and secured by the common stock of Alabama Rock Asphalt, Inc. The note, together with the collateral, was purchased by A. Iselin & Co. at public auction on January 29, 1930.

From time to time during the year 1929 the noteholders above mentioned discussed the matter of what should be done to complete the organization of the old corporation. At that time it was not contemplated that a new corporation would be organized, but only that additional stock or securities would be issued by the old corporation to the noteholders. However, two of the original noteholders had sold their notes without informing the purchasers of the agreement to accept stock of the old corporation for the amounts thereof at the maturity of the notes, and these purchasers refused to accept stock, insisting on payment in cash. Because of that fact, three of the noteholders were appointed late in 1929 as a committee to represent the remaining original noteholders in connection with a reorganization of the old corporation. Later, the attorney for the receiver of the Deep Water Corporation was appointed to this committee as a fourth member.

On February 1, 1930, the committee decided upon a plan of reorganization, which provided that a new corporation would be organized under the name of Alabama Asphaltic Limestone Co., to bid in at foreclosure sale all the business, property and assets of the old corporation. The authorized capitalization of the new corporation was to consist of 10,000 shares of preferred and a like number of shares of common stock, all without par value. The reorganization plan further provided that the preferred and common stock of the new corporation would be issued to the creditors of the old corporation on the basis of one share of preferred and one share of common for each

$100 of indebtedness due them by the old corporation. The reorganization plan was sent to the creditors of the old corporation under date of November 29, 1930, and all the creditors assented thereto, except the two holders of notes acquired by purchase, referred to above. The other noteholders refused to pay the two dissenting noteholders in cash. Thus, it became necessary to effect the reorganization by means of a proceeding in bankruptcy.

On September 11, 1930, an involuntary petition in bankruptcy was filed against the old corporation in the District Court of the United States for the Southern Division of the Northern District of Alabama. Such proceeding was instituted with the consent and at the instance of all the noteholders, except the two dissenters before mentioned. Since the Deep Water Corporation, the sole stockholder of record of the old corporation, had gone into receivership and could not file the petition in bankruptcy, the noteholders arranged for three small creditors to file such petition. Wallace L. Caldwell, president of the old corporation, was appointed its receiver and subsequently trustee in bankruptcy.

The schedule of debts of Alabama Roek Asphalt, Inc., bankrupt, as of September 11, 1930, included the notes referred to hereinabove, which were designated in such schedule as "Long-Term Notes with Interest Accrued to September 11, 1930." On October 1, 1930, creditors' appointment of trustee was issued by the referee in bankruptcy. An appraisal of the assets of the bankruptcy was made and filed, which disclosed a total appraised value of $155,876.52. On December 6, 1930, petition of the trustee for sale of bankrupt's property was filed, and on January 9, 1931, the trustee's report of sale of the assets was filed with and confirmed by the referee.

The balance sheet per books of Alabama Rock Asphalt, Inc., at December 31, 1930, disclosed a deficit (liabilities in excess of cost or book value of assets) in the amount of $331,301.61. At the same date, the total amount of principal of the notes then owed by the com-

pany was $755,879.48 and interest accrued was $37,509.14. It also owed A. Iselin & Co. $8,386.70 for which notes had not been issued, making a total of $801,775.32. There were additional claims against the company of sundry creditors in the amount of $36,915.19. The aggregate of all such liabilities was $838,690.51, or an excess of liabilities (not including capital stock) over the appraised value of the assets in the amount of $682,813.99.

The trustee's report of sale recited that pursuant to the order of sale the trustee offered at public auction on January 8, 1931, free of all liens and encumbrances, except taxes, all of the property of the bankrupt; that at such sale, a committee consisting of four individuals named and described as "constituting the Reorganization Committee of the creditors" of the bankrupt, bid for the property and assets of the bankrupt the sum of $150,000 and that sale was made to the committee at that price.

The trustee's report further set forth that in part payment of the purchase price the individuals constituting the reorganization committee had offered to deliver to the trustee agreements of various and sundry creditors of the bankrupt to accept preferred and common stock of a company to be organized for the purpose of purchasing the property and assets of the bankrupt in full payment and discharge of their claims against the bankrupt, and had also deposited with the trustee the sum of $15,000 in cash, in part payment of the purchase price of the bankrupt's property. The purchasers further offered to pay in cash, according to the report, any balance due of the purchase price which would be necessary to pay cost of administration, certificates of indebtedness issued by the receiver and trustee, all preferred claims, and a dividend to the nonassenting creditors who had not joined in and accepted the plan of reorganization theretofore filed with the court.

The new corporation, before referred to, was thereafter duly organized, and is the petitioner in the present proceeding. On or about January 19, 1931, petitioner

acquired all of the assets of the predecessor corporation and issued therefor 95.586 percent of its total capital stock to the so-called "long-term noteholders" in proportion to the amount of their respective notes. The balance of 4.414 percent of the capital stock was issued to small creditors of the old corporation who agreed to come in on the plan of reorganization and accept such stock for their claims. Creditors representing 92.089 percent of the claims against the old corporation received all of the capital stock of petitioner in exchange for such claims in proportion to the respective amounts thereof. The remaining creditors refused to accept stock of petitioner for their claims and instead received in cash their proportionate distributive share of the bankruptcy sale price.

The balance sheet per books of the new company at January 19, 1931, contained the following item under liabilities: "A. Iselin & Co. $40,000."

The business of the old corporation was continued by the new corporation. Operations were not interrupted by the transactions mentioned above, but were carried on during the taxable year and the periods prior and subsequent thereto by organizations of substantially the same interested persons. Caldwell, president of the old corporation, became president of the petitioner upon its organization.

During the taxable year petitioner ascertained to be worthless and charged off certain debts in the total amount of $1,200.

OPINION.

HILL: The specific issue raised for decision in this case is whether respondent erred in respect of the basis used in computing the amounts allowed by him as deductions from petitioner's gross income for the taxable year on account of depreciation and depletion. The parties agree, however, that this question turns upon whether or not the transaction detailed in our findings of fact above constituted a reorganization within the meaning of the

taxing act. If so, then it is stipulated that the amounts of depreciation and depletion properly allowable are those claimed by petitioner. Such amounts were computed on the cost basis of the property in the hands of the predecessor or old corporation, who, petitioner contends, was its transferor. If there was no reorganization, it is stipulated that the deductions for depreciation and depletion as allowed in the deficiency notice are correct. In the deficiency notice, respondent held "that the basis of * * * depreciation and depletion is the price for which the property was bid in at the receiver's sale", and computed the allowed deductions accordingly. Under respondent's theory the noteholders' committee which bid in the property at the receiver's sale was petitioner's transferor.

In view of the stipulations of the parties there is only one determinative question which we have to decide, namely, whether or not there was a reorganization. The applicable statute in the determination of this question is section 112 (i) (1) of the Revenue Act of 1927.[1]

On brief respondent contends that there was no reorganization, but only a purchase of assets of a bankrupt corporation at a trustee's sale by the common, unsecured creditors of the corporation, and that the proper basis for computing depreciation and depletion of the assets in the

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[1] (i) Definition of reorganization.—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, * *

hands of petitioner is the cost to the purchasing creditors, which was the price paid at the sale for the assets.

Respondent's position, we think, can not be sustained. The facts establish that a reorganization in reality was effected within the meaning of the revenue act, as well as within the meaning of the terms as commonly understood. There was a complete reorganization of the corporate business, which is essential to make it a reorganization for tax purposes. Cf. Gregory v. Helvering, 293 U. S. 465. The successor corporation, petitioner herein, acquired all the properties of another corporation, its predecessor, in exchange for all of its capital stock. Also, possibly in addition, it assumed an obligation to repay to the reorganization committee the amount of cash furnished by the committee to pay costs of administration, other expenses, and dividends to the nonassenting creditors. This is one of the transactions described in section 112 (i) (1) (A), supra, as constituting a reorganization.

The fact that the reorganization committee paid an undisclosed amount of cash for expenses and dividends to nonassenting creditors, and petitioner's opening balance sheet discloses that it assumed an obligation to repay Iselin & Co. $40,000, may indicate that at least a part of such amount represents a cash consideration so paid for the properties of the old corporation. But if the purchasing corporation did in fact pay some cash, in addition to stock, for the assets of its predecessor, this fact, under the provisions of the statute before quoted, did not prevent the transaction from being a reorganization, if there was a substantial continuity of beneficial ownership in the assets, to which latter point further reference will be made.

Respondent urges that his contention is supported by the fact that the noteholders and other creditors involved herein were neither stockholders, bondholders, preferred creditors, nor secured creditors of the old corporation; that they were only common, unsecured creditors and therefore do not come within the purview of section

112 (b) (3) of the Revenue Act of 1928.[2] On this ground, also, respondent attempts to distinguish our decision in Frederick L. Leckie, 37 B. T. A. 252, and the decision of the Circuit Court of Appeals for the Seventh Circuit in Commissioner v. Kitselman, 89 Fed. (2d) 458, reversing, 33 B. T. A. 494; certiorari denied, 302 U. S. 709.

It is argued that the creditors in the instant proceeding did not exchange stock or securities of the old corporation for stock in the new corporation, within the meaning of section 112 (b) (3), and that, hence, there was absent the continuity of interest necessary to reorganization. Whether there was such an exchange is not a question we have to decide here. Such continuity of interest may be established in many ways other than by a state of facts to which 112 (b) (3) is applicable, as will readily appear by reference to the reorganization and nonrecognition provisions of the statute.

Section 112 (b) (3) had direct application to the ultimate question for determination in the Leckie and Kitselman cases, to wit, whether there was a tax free exchange of securities. But in each of those cases it was also necessary to determine whether there was a corporate reorganization in order to determine whether section 112 (b) (3) applied to an individual taxpayer who, pursuant to the plan of reorganization, exchanged bonds of the old corporation for stock and bonds of the new corporation. To the extent and only to the extent of the court's holding in each of those cases on the question of reorganization was there determined a question like the one presented here. The question of reorganization in those cases was determined under section 112 (i) (1), which is the statutory

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[2] (3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

provision applicable to the question which we have to determine here.

In the Kitselman case the continuity of interest in corporate assets necessary to reorganization was based on the fact that the bondholders as prior lien creditors of the old corporation were the only persons who had a beneficial interest in its assets and that they received in exchange for their bonds a part of the capital stock and bonds of the new corporation to which the assets were transferred. The fact that the bondholders were first lien creditors gave them a priority in interest in the assets over all other creditors but it was as mere creditors of an insolvent corporation and not as holders of "securities" that they became the owners of the beneficial interest in the assets to the exclusion of the stockholders and acquired the right to manage the affairs of the corporation. It was this ownership of beneficial interest resulting from their status as creditors of an insolvent corporation that stepped up the bondholders (as mere creditors) to the position "somewhat akin to preferred stockholders." The court in that case said:

> Bondholders are ordinarily viewed merely as creditors, but when the assets of the corporation are less than its obligations, the bondholders are in actuality and for all practical purposes pretty much the corporation.

The fact that the bondholders in the Kitselman case were secured creditors operated only to exclude the other creditors of the insolvent corporation from any beneficial interest which, if possessed, would have raised them also from the status of mere creditors to the owners of beneficial interest in the corporate assets and to a consequent status akin to that of stockholders. The fact that the bonds in the Kitselman case were secured did not differentiate them from unsecured bonds as "securities."

In Commissioner v. Tyng, 106 Fed. (2d) 55, quoted with approval in Stirn, Inc. v. Commissioner, 107 Fed. (2d) 390, the court said:

The proper test as to whether bonds come within the meaning of "securities" under section 112 (b) (3) is not whether they are secured or unsecured, but whether they represent a long or short term investment on the part of the transferor.

Commissioner v. Tyng, supra, was reversed by the Supreme Court in Helvering v. Tyng, — U. S. — (Jan. 2, 1940) on the holding that there was a corporate reorganization under section 112 (i) (1), but the interpretation as to what constitutes a "security" under section 112 (b) (3) was not involved in the reversal.

Accordingly, an unsecured "security" satisfies the requirements of section 112 (b) (3) the same as a secured "security" in effectuating the continuity of interest upon the principle of which the non-recognition provision of the section is based. But a holder of an unsecured "security" of a solvent corporation is a mere creditor and is on a parity with any general creditor in subjecting the assets of a debtor corporation to the payment of his claim. He has no status with respect to such assets different from that of any other unsecured creditor. A holder of an unsecured bond of a bankrupt corporation has proportionately the same beneficial interest in the assets of such corporation as any general creditor. This is true regardless of whether or not the bond has the status of a "security", as contemplated in section 112 (b) (3). By reason of the bankruptcy of the debtor corporation, each such creditor is stepped up from the status of mere creditor to that of owner of a beneficial interest in the corporation's assets.

The proposition of whether a creditor has a beneficial interest in the assets of an insolvent corporation is not dependent upon the form in which the debt is evidenced. It may depend on whether other debts are secured by prior liens on the assets involved. When a general creditor is stepped up to the status of ownership of a beneficial interest in the assets of a corporation by reason of its insolvency he has a right therein that is property;

he owns something; he has an investment; he has a status with respect to such assets comparable to that of a common stockholder. When that beneficial interest follows the assets into the hands of a transferee corporation there is continuity of beneficial ownership.

The creditors in the instant proceeding represented the old corporation in executing the plan of reorganization just as the court held the creditors did in the Kitselman case, supra, and in Commissioner v. Newberry Lumber & Chemical Co., 94 Fed. (2d) 447. Therefore, subdivisions (b) (4) and (d) of section 112 of the Revenue Act of 1928 are applicable on the question of nonrecognition of gain or loss.

Respondent further asserts that when the noteholders' committee purchased the assets at the trustee's sale it acquired the property free from all liens and debts, except taxes, and hence cost to the committee, which was the price paid at the sale, is the basis which must be used for depreciation and depletion purposes, citing Olean Sand & Gravel Corporation, 24 B. T. A. 324. Finally, respondent cites Beverly Wall Paper Co., 36 B. T. A. 353, as being similar to the instant proceeding on the facts. We are unable to agree with respondent's argument.

The Beverly case is clearly distinguishable. The three creditor corporations there referred to were held to be merely purchasers of the assets sold by the receiver. "The fact that they were creditors of the bankrupt corporation had no bearing on that purchase because their claims against the bankrupt constituted no part of the consideration paid." Here the contrary appears. However, our decision in that case was reversed (on another ground) by the Circuit Court of Appeals for the Third Circuit, 98 Fed. (2d) 211, and, in the light of subsequent decisions, requires no further discussion here.

The Olean case likewise is not in point. There the creditors of a bankrupt corporation bought in its property at a receiver's sale, free of all liens and claims. So far as shown, it was an unconditional purchase, not sub-

ject to a prior reorganization agreement. This situation was not changed by the fact that the creditors subsequently organized a corporation to which the purchased property was transferred in exchange for stock. The circumstances here are materially different. The noteholders' committee did not purchase the bankrupt corporation's property for themselves but as trustee for the benefit of all the assenting noteholders and other assenting creditors, subject to the agreement previously entered into under the reorganization plan.

In the light of the reorganization plan and agreement thereunder the noteholders' committee was in substance merely the instrumentality by which the bankruptcy proceeding was instituted and through which the asset of the old corporation were transferred to the new corporation, in exchange for all of its stock, both voting common and nonvoting preferred. The stock of the new corporation was not issued directly to the old corporation in exchange for the latter's property and by it distributed to the creditors in satisfaction of its obligation, but this did not prevent the transaction from being a reorganization. The intervention of the bankruptcy action prevented issuance of the stock directly to the old corporation. The stock of the new corporation was issued directly to the assenting noteholders and other creditors instead of to the committee. This was merely an unimportant cutting of corners. The trustee in bankruptcy was the president of the old corporation and became president of its successor, the petitioner, upon the latter's organization. The entire transaction from its inception was directed solely to a single objective, the reorganization of the business of the old corporation. That business was carried on without interruption by the same organization of individuals, constituting the personnel first of the old corporation and then of the new corporation.

The reorganization in the instant proceeding differs in two respects from the circumstances usually attending such form of reorganization, in that, (1) neither the old

corporation nor its stockholders, as such, instituted or participated in any manner in the transaction; and (2) the creditors, who assumed charge of the old corporation and brought about its reorganization as the real parties in interest, were common or unsecured creditors. The principle applied by the court in its decision on the facts in Commissioner v. Kitselman, supra, is equally applicable to the facts here. In that case it was held that there was a statutory reorganization. In its discussion of the case the court said:

> Although the instant situation is rather novel in the aspect that neither the stockholders nor corporation participated in any way in the plan whereby the mortgage was foreclosed, the new company formed, and the assets transferred to the committee and by it to the new company, we believe a statutory reorganization was effected. The only reason the stockholders did not participate in the plan was that their stock represented no assets and was valueless, and therefore they were without right to speak. In re 620 Church Street Corporation, 299 U. S. 24, 27, 57 S. Ct. 88, 81 L. Ed. —.
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> It is clear that the bondholders were the moving spirit and were treated as the owners in fact, and it follows that they must be viewed as a class of "stockholders" somewhat akin to preferred stockholders with cumulative dividend rights. Their position was stepped up by reason of what had occurred and the finding that there was no equity over the lien of the mortgage. Where the assets of the corporation fall far below the amount required to pay the bondholders in full, the bondholders in bankruptcy reorganization supersede the stockholders. They acquire the stockholders' rights to manage the corporate affairs.
>
> Under the facts in the instant case it conclusively appears that the creditors of the old corporation were the only persons having a beneficial interest in its assets. Accordingly, they were stepped up to the status compar-

able to that of common stockholders and acquired the stockholders' rights to manage the corporate affairs and did so act through the noteholders' committee in the formulation and execution of the plan of reorganization.

We followed the Kitselman decision in Frederick L. Leckie, supra, and Marlborough House, Inc., 40 B. T. A. 881. These cases involved mortgage bondholders or secured creditors. However, we think the doctrine announced is equally applicable under the circumstances of the instant proceeding. The fact that the indebtedness due the creditors here was unsecured and evidenced merely by notes and open accounts rather than bonds is, in our opinion, wholly immaterial. The value of the corporation's assets was far less than the amount of its obligations; it was a bankrupt; its stockholders had no interest in the assets; there were no bondholders or preferred creditors, and the unsecured creditors were the only persons having any substantial interest in the assets. Such interest was continued upon the transfer of the assets to petitioner, since the assenting creditors received all of petitioner's capital stock in satisfaction of their claims against the old corporation. As stockholders of the new corporation their interest was definite and material and represented the entire value of the transferred assets. Thus, the rule of continuity of interest in the transferee is fully met. Cf. G. & M. Manufacturing Co. v. Helvering, 296 U. S. 389, and Pinellas Ice & Cold Storage Co. v. Commissioner, 287 U. S. 462.

We think it is unimportant that the transaction in this case was consummated by means of a bankruptcy proceeding. That fact in any event bears only upon the question of whether or not there was a sufficient continuity of interest in the transferee. The fact that the assets of the old corporation were sold under a court proceeding does not in and of itself prevent the transaction from being a reorganization. As we pointed out in C. H. Mead Coal Co., 28 B. T. A. 599, 609, "the judicial sale is the usual incident of reorganizations." In De Blois v. Commissioner, 36 Fed. (2d) 11, the Circuit Court of Ap-

peals for the First Circuit expressed the opinion that Congress did not intend to distinguish between voluntary and involuntary reorganizations, and "whether court proceedings of any kind are found to be a necessary or expedient means of effecting a reorganization, are, for present purposes, a distinction without a difference." This view was approved by the Circuit Court of Appeals for the Sixth Circuit in Commissioner v. Newberry Lumber & Chemical Co., supra, which reversed 33 B. T. A. 150.

The facts in the Newberry case, in many material respects, are similar to the instant proceeding. There, the old corporation, being unable to meet the obligations of its bonds, was placed in receivership in the United States District Court for the Western District of Michigan in March 1926. In May 1929 the court ordered a sale of the remaining properties by a special master. During the receivership a bondholders' protective committee, representing 93 percent of the outstanding bonds, was formed and formulated plans for a reorganization of the company. At the master's sale both the mortgaged and unmortgaged assets of the old company were bid in by the committee. The mortgaged assets were bid in for $400,000 and paid for by bonds held by the committee, plus sufficient cash to pay expenses and nondepositing bondholders. The unmortgaged assets were bid in for $140,000 and paid for in cash. The property was then transferred by the committee to a newly formed corporation in exchange for all of its stocks and bonds, which were distributed pro rata among the bondholders of the old corporation represented by the committee.

Our holding that the transaction did not constitute a reorganization was based upon our conception of a lack of essential continuity of interest, but, as the court pointed out, the bondholders of the old corporation, who owned the beneficial interest in the assets, became the bondholders and stockholders in the transferee or new corporation. The question in that case, as in the present case, was the proper basis for depletion and depreciation of the assets after transfer to the new corporation, and the

court held that "It was * * * error for the Board to establish the capital base on cost price paid at the decretal sale."

We need not inquire here whether a bankruptcy sale may not in any circumstance affect the continuity of beneficial interest in the corporate assets. Certainly it could not and did not do so under the facts of this proceeding. The cancellation of the unsatisfied portions of the noteholders' claims by reason of the bankruptcy sale is not determinative of the question presented. Coincident with such cancellation, the noteholders became the beneficial owners of the corporate assets in exchange for their claims by reason of the acquisition by the noteholders' committee. The fact remains clearly demonstrated that prior to such sale the creditors of the old corporation, including the noteholders, were the only persons having any beneficial interest in the assets. Commissioner v. Kitselman, supra. After the sale and transfer to the new corporation, practically all of the same persons, including all but two of the former noteholders, were the sole stockholders of the new corporation and hence continued to be the owners of the beneficial interest in the assets.

Thus, to a very substantial extent, there was an unbroken and absolute continuity of interest in the assets beginning prior to and extending beyond completion of the transaction here involved. Irrespective of the precise effect of the bankruptcy sale, the beneficial interest in the assets was not vested at any time during the period of reorganization in any person other than the creditors of the old corporation.

Following the Kitselman and other decisions above cited, we hold that the transaction in the case at bar constituted a reorganization within section 112 (i) (1), supra.

It follows that petitioner is entitled to use the asset basis of the old corporation in computing the deductions allowable from gross income for the taxable year on account of depreciation and depletion. The parties have

stipulated that in the event of such holding, the amounts so allowable are $21,630.63 and $6,019.58, respectively. The parties have further stipulated that petitioner is entitled to a deduction from gross income for the taxable year in the amount of $1,200, representing debts ascertained to be worthless and charged off during that year. Both stipulations will be given effect in the recomputation on final settlement.

Reviewed by the Board.

Decision will be entered under Rule 50.

VAN FOSSAN and LEECH dissent.

MURDOCK, dissenting: The only question considered in the prevailing opinion is whether or not there was a reorganization. The opinion holds that there was a reorganization and then allows a deduction for depreciation computed upon the same basis as the predecessor corporation was entitled to use. The Commissioner allowed a deduction for depreciation based upon the cost of the properties to the petitioner and his determination can not be reversed unless, first, there was a reorganization and, second, no gain or loss to the predecessor corporation was recognized in the transaction whereby the assets passed out of its hands. That is, even if there was a statutory reorganization, the new corporation can not use the same basis which the old corporation was entitled to use unless there is some provision of section 113 which gives the new corporation the right to use that old basis. The prevailing opinion does not attempt to point out any such provision of section 113 but relies upon the stipulation of the parties. The parties, however, can not stipulate a matter of law. Here, all of the facts are revealed and a decision must be made as to whether the new corporation has a right to use the old basis.

The special provisions are contained in section

113 (b). Most of those provisions need no consideration. Paragraph 6 does not apply because this new corporation acquired the property by the issuance of its stock. Paragraph 8 has no application because it relates only to nontaxable exchanges under section 112 (b) (5) and there is no contention that there was a nontaxable exchange within section 112 (b) (5). Paragraph 7 is the only one which requires any particular consideration. It provides that the basis in the hands of the transferee shall be the same as it was in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon the transfer, provided that immediately after the transfer an interest or control in such property of 80 percentum or more remained in the same persons or any of them. If the reasoning of the prevailing opinion, that the creditors were in control of the old corporation prior to the transfer, is sound then the control required by this provision would exist, but if the stockholders of the old corporation were in control at that time, then this provision of the statute would not apply because the control did not remain in the same persons or any of them.

Even though the control existed, still, it is necessary to determine whether or not and to what extent the loss of the old corporation upon the assets was recognized for income tax purposes. This depends upon section 112, which provides in general that the entire gain or loss upon the disposition of property is recognized and then makes certain exceptions. None of the exceptions applies to deny the old corporation its right to deduct its entire loss upon the disposition of its assets. Section 112 (b) (3), frequently mentioned in the majority opinion, has nothing whatever to do with the case. The only exception relating to corporations is that contained in section 112 (b) (4). It is that no gain or loss shall be recognized if a corporation, a party to a reorganization, exchanges property in pursuance of a plan of reorganization solely for stock or securities in another corporation a party to the reorganization. Obviously that provision

does not apply here because the old corporation did not exchange its property solely or partially for stock or securities in the new corporation. Its property was taken from it through a bankruptcy proceeding. Consequently, the entire loss of the old corporation upon the disposition of its properties was recognized. Finally, even if the new corporation were entitled to use the same basis as the old corporation, nevertheless that basis would have to be reduced by the loss of the old corporation upon the disposition of the property. The basis thus computed would be less than the basis used by the Commissioner in determining the deficiency. I am unable to find in the statute any justification for allowing this petitioner to use as its basis for depletion the same basis as the old corporation was entitled to use or any greater basis than the cost of the assets to it.

The foregoing discussion makes unnecessary a decision of whether or not there was a reorganization. However, I have serious doubts whether, in the light of the recent decision of the Supreme Court in Le Tulle v. Scofield, — U. S. — (Jan. 2, 1940), there was a reorganization within the following definition contained in section 112 (i) (1) (A): "A merger or consolidation (including the acquisition by one corporation of * * * substantially all the properties of another corporation)." A transaction, to constitute a reorganization under this provision, must resemble a merger or consolidation. Pinellas Ice & Cold Storage Co., 287 U. S. 262; Bus & Transport Securities Co. v. Helvering, 296 U. S. 391. The prevailing opinion fails to point out any resemblance. Only the stockholders of the old corporation had a proprietary interest or stake in the old corporation as a corporation. The creditors had no such interest. Le Tulle v. Scofield, supra. The creditors had to look to the assets alone for satisfaction of the debts due them. The prevailing opinion, relying upon the Kitselman case, reasons that those creditors, by reason of the bankruptcy, acquired "a status with respect to such assets comparable to that of a common stockholder" of the old corporation; they were akin to

stockholders of the old corporation; they became stockholders of the new corporation; therefore, a continuing interest essential to a statutory reorganization existed in them. The Kitselman case was decided prior to the Le Tulle case. The Supreme Court, considering the same definition of a reorganization, pointed out in Le Tulle v. Scofield, supra, that the statute is not satisfied unless the transferor retains a substantial stake in the enterprise, and where the transferor receives only cash and bonds of the transferee, no proprietary interest in the enterprise is retained because all bondholders are mere creditors, and creditors have no proprietary interest or stake in a corporation. If bonds of the transferee do not give to the holders any proprietary interest in the enterprise or proprietary stake within the purview of the statute, it is difficult to see how unsecured creditors of the transferor might be considered as having any proprietary interest or stake in the enterprise within the purview of the statute so that the essential continuing interest might be traced through them.

STERNHAGEN and OPPER agree with this dissent.

DISNEY, dissenting: I agree with all that Mr. Murdock has said in his dissent. In addition, even if we assume reorganization and the applicability of section 112 (b) (4), in spite of the fact that the section applies only where the exchange is solely for stock or securities, and such was not the case here, we would still be under the necessity of considering the modification of section 112 (b) (4) by section 112 (d). Under section 112 (d) it is necessary to inquire whether the corporation receiving "other property or money" distributes it in pursuance of the plan of reorganization. If such distribution does not take place, gain is recognized not in excess of the money and value of other property received. This whole question the majority opinion does not consider, though money was in fact received, a dividend paid only to nonassenting creditors, administration costs and receiver's certificate

and preferred paid claims. In addition, there was an obligation to pay A. Iselin & Co. $40,000, apparently on behalf of the old corporation. I think we should have considered the application of United States v. Hendler, 303 U. S. 564, to these obligations and therefore should have considered adjustment of base under section 112 (d), and that without examination of such questions the case is not completely disposed of, even on the theory that there was reorganization, with which I disagree. I therefore dissent.

MELLOTT agrees with the views expressed in both of the above dissents.

(SEAL)

(SEAL)

UNITED STATES BOARD OF TAX APPEALS
WASHINGTON

ALABAMA ASPHALTIC LIMESTONE COMPANY, Petitioner, VS. COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 91793.

DECISION

Pursuant to the Findings of Fact and Opinion of the Board promulgated February 14, 1940, the respondent herein having on February 29, 1940, filed a recomputation and the petitioner having on March 9, 1940, filed an acquiescence therein, now therefore, it is

ORDERED AND DECIDED: That there is a deficiency in income tax for the year 1934 in the amount of $210.65.

(SIGNED) SAM B. HILL,
Member.

Enter:

Entered Mar 13 1940 (SEAL)

Received May 13 1940
U. S. Board of Tax Appeals

United States Board of Tax Appeals
Filed May 13 1940

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. ALABAMA ASPHALTIC LIMESTONE COMPANY, Respondent on Review.	B.T.A. Docket No. 91793.

PETITION FOR REVIEW
AND
ASSIGNMENTS OF ERROR

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I
JURISDICTION

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that the respondent on review (hereinafter called

the taxpayer), is a corporation, organized on January 19, 1931, under the laws of the State of Alabama, with its principal office and place of business located at Birmingham, Alabama; that the said taxpayer filed its Federal income tax return for the taxable year 1934 in the office of the Collector of Internal Revenue for the District of Alabama, located at Birmingham, Alabama, which said collection district is within the jurisdiction of the United States Circuit Court of Appeals for the Fifth Circuit, wherein this review is sought.

The Commissioner seeks a review of the decision of the United States Board of Tax Appeals pursuant to the provisions of Sections 1141 and 1142 of the United States Internal Revenue Code.

II

PRIOR PROCEEDINGS

On October 7, 1937, the Commissioner in accordance with Section 272(a) of the Revenue Act of 1934, advised the taxpayer by registered mail that the determination of its income tax liability for the taxable year 1934 disclosed a deficiency in tax of $2,236.56. Thereafter, on December 31, 1937, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals. The Commissioner filed his answer to the petition on February 28, 1938. The taxpayer, with leave of the Board and without objection, filed an amendment to the petition on February 13, 1939; and the Commissioner filed his answer to the amendment to the petition on February 14, 1939.

The case was heard on February 13-14, 1939, and on February 14, 1940, the Board of Tax Appeals promulgated its findings of fact and opinion (41 B. T. A.—No. 51), and on March 13, 1940, entered its decision ordering and deciding that there is a deficiency in income tax for the year 1934 in the amount of $210.65.

III

NATURE OF CONTROVERSY

The Alabama Rock Asphalt, Inc., (hereinafter sometimes referred to as the "old corporation") was an Alabama corporation, organized on January 12, 1927, with an authorized capital of 6,500 shares, no par, common stock, 20 shares of which were subscribed for in cash. The Deep Water Coal & Iron Corporation (hereinafter referred to as the "Deep Water Corporation"), subscribed for the remaining 6,480 shares, and transferred therefor property which cost it $208,901.76. To provide capital with which to erect buildings, purchase machinery, and carry on its business, individual stockholders of the Deep Water Corporation loaned the old corporation $400,000.00 cash; and up to August 1, 1929, the total sum of $733,687.48 had been loaned or advanced to the old corporation. The old corporation executed an unsecured interest-bearing (7%) note for each loan or advancement, all of which were to mature on February 1, 1930, except a note dated January 14, 1929, for $80,000.00. This latter note was endorsed by Deep Water Corporation and was secured by the common stock of the old corporation. The note, together with the collateral, was purchased by A. Iselin & Company at public auction on January 29, 1930. During 1929, the noteholders discussed matters about issuing stock or securities for the notes, but two purchasers of notes of original holders refused to accept stock, insisting on cash.

Late in 1929 a committee was appointed to represent the bondholders; and on February 1, 1930, it decided to organize a new corporation under the name of Alabama Asphaltic Limestone Company (taxpayer herein) to acquire the assets of the old corporation with its stock to be paid to the creditors of the old corporation. All the creditors consented except the two above-mentioned purchasers of notes. On September 11, 1930, an involuntary petition in bankruptcy was filed by three small creditors against the old corporation in a United States District

Court, with the consent and at the instance of all the noteholders, except the two dissenters. The president of the old corporation was appointed receiver and subsequently trustee in bankruptcy. The assets of the old corporation were appraised at $155,876.52 in an itemized schedule; and on December 6, 1930, a petition of the trustee for sale of the bankrupt's property was filed, and on January 9, 1931, the trustee's report of sale of the assets was filed with and confirmed by the referee.

The trustee's report disclosed that pursuant to the order of sale, the trustee offered at public auction on January 8, 1931, free of all liens and encumbrances, except taxes, all of the property of the bankrupt, and that it was bid in by the committee of the creditors for the sum of $150,000.00. The report further set forth that in part payment of the purchase price the individuals constituting the reorganization committee had offered to deliver to the trustee agreements of various and sundry creditors of the bankrupt to accept preferred and common stock of a company to be organized for the purpose of purchasing the property and assets of the bankrupt in full payment and discharge of their claims against the bankrupt, and had also deposited with the trustee the sum of $15,000.00 in cash, in part payment of the purchase price of the bankrupt's property. The purchasers further offered to pay in cash, according to the report, any balance due of the purchase price which would be necessary to pay cost of administration, certificates of indebtedness issued by the receiver and trustee, all preferred claims, and a dividend to the nonassenting creditors who had not joined in and accepted the plan of reorganization theretofore filed with the court.

The new corporation was organized on January 19, 1931, under the laws of the State of Alabama (taxpayer herein), and on or about the same date it acquired all of the assets bid in at the bankrupt's sale and issued therefor 95.586% of its total capital stock to the so-called "long-term noteholders" in proportion to the amounts of their respective notes. The balance of 4.414% of stock

was issued to small creditors of the old corporation who agreed to take such stock. The remaining creditors received cash instead of stock. The balance sheet per books of the new company at January 19, 1931, contained the following item under liabilities: "A. Iselin & Co. $40,000.00".

The taxpayer deducted on its return for the taxable year depreciation and depletion in the respective amounts of $21,630.63 and $6,019.58, which amounts were computed on the cost of the assets to the old corporation.

The Commissioner considered the transfer of the assets to the creditors' committee by the old corporation a sale and not an exchange, subject to the reorganization provisions of the statute, and that the basis of gain or loss, depreciation and depletion is the price for which the property was bid at the receiver's sale, and allowed depreciation and depletion in the respective amounts of $13,522.71 and $593.56.

The Board of Tax Appeals held that the transactions hereinabove set forth constituted a reorganization within the meaning of Section 112(i)(1)(A) of the Revenue Act of 1928, without citing which subdivision of Section 113 was applicable, and that the taxpayer is entitled to use the asset basis of the old corporation in computing the deductions allowable from gross income for the taxable year on account of depreciation and depletion in the respective amounts stipulated, to-wit, $21,630.63 and $6,019.58. The Board also held that the creditors were set up in the stockholders' place and they had a beneficial interest in the assets of the old corporation which followed the assets into the hands of the new corporation. Seven members of the Board dissented from the majority opinion.

The Commissioner presents that there was no reorganization within the meaning of the Revenue Acts, but only a purchase of the assets of a bankrupt corporation at a trustee's sale by the common, unsecured creditors of the old corporation and the assets were transferred to the

new corporation by the bondholders' committee, a separate taxable entity, for its stock in a nontaxable transaction, as described in Section 112(a)(5) of the Revenue Act of 1928, and that the proper basis for computing depreciation and depletion of the assets in the hands of the taxpayer is the cost to the purchasing creditors, its transferor, which was the price paid at the sale for the assets (Section 113(a)(8)(A), Revenue Act of 1934).

IV

ASSIGNMENTS OF ERROR

That the Commissioner of Internal Revenue, being aggrieved by the opinion and decision of the United States Board of Tax Appeals in this proceeding, hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Fifth Circuit, and for the correction of the manifest errors which therein occurred, and intervened to his prejudice. The errors committed by the Board, which are relied upon by the Commissioner as the basis of this petition for review, are as follows:

(1) The Board of Tax Appeals erred in holding and deciding that the taxpayer acquired its assets and properties on or about January 19, 1931, from the Alabama Rock Asphalt, Inc., in connection with a reorganization within the meaning of Section 112(i)(1)(A) of the Revenue Act of 1928.

(2) The Board of Tax Appeals erred in failing to hold and decide that the taxpayer did not acquire its assets and properties on or about January 19, 1931, from the Alabama Rock Asphalt, Inc., in connection with a reorganization.

(3) The Board of Tax Appeals erred in holding and deciding that the committee of the noteholders decided upon a plan of reorganization of the Alabama Rock Asphalt, Inc., and that the taxpayer was organized pursuant to such plan.

(4) The Board of Tax Appeals erred in failing to hold and decide that the noteholders and other creditors were only common, unsecured creditors, and do not come within the purview of Section 112(b)(3) of the Revenue Act of 1928.

(5) The Board of Tax Appeals erred in holding and finding that the creditors of the "old corporation" were in control of it prior to the transfer of its assets to the successor owner.

(6) The Board of Tax Appeals erred in failing to hold and decide that the creditors did not exchange stock or securities of the Alabama Rock Asphalt, Inc., for stock in the taxpayer within the meaning of Section 112(b)(3) of the Revenue Act of 1928.

(7) The Board of Tax Appeals erred in holding and finding that the taxpayer acquired its assets on or about January 19, 1931, from the Alabama Rock Asphalt, Inc., there being no substantial evidence to support such finding and determination.

(8) The Board of Tax Appeals erred in holding and finding that on or about January 19, 1931, the taxpayer acquired all of the assets of the predecessor corporation, Alabama Rock Asphalt, Inc., there being no evidence to support such finding and determination.

(9) The Board of Tax Appeals erred in holding and finding that the loans and advances to the old corporation were made by the stockholders of the Deep Water Coal & Iron Corporation upon the express understanding that they would receive stock or securities of the old corporation for the respective amounts so advanced and loaned, there being no substantial evidence to support such finding and determination.

(10) The Board of Tax Appeals erred in holding and deciding that by reason of the bankruptcy of the Alabama Rock Asphalt, Inc., the debtor corporation, each of the unsecured creditors was stepped up from the status

of a mere creditor to that of owner of a beneficial interest in the corporation's assets.

(11) The Board of Tax Appeals erred in holding and deciding that there was the necessary continuity of beneficial ownership in the properties and assets in the hands of the taxpayer as to satisfy the statute.

(12) The Board of Tax Appeals erred in failing to hold and decide that only the stockholders of the "old corporation" had a proprietary interest or "stake" in the "old corporation" as a corporation.

(13) The Board of Tax Appeals erred in failing to hold and decide that the creditors of the "old corporation" had no proprietary interest or "stake" in the "old corporation" as a corporation.

(14) The Board of Tax Appeals erred in holding and deciding that "the noteholders' committee did not purchase the bankrupt corporation's property for themselves but as trustee for the benefit of all the assenting noteholders and other assenting creditors, subject to the agreement previously entered into under the reorganization plan".

(15) The Board of Tax Appeals erred in holding and finding that the operations of the "old corporation" were continued by the "new corporation" by organization of substantially the same interested parties.

(16) The Board of Tax Appeals erred in holding and deciding that the taxpayer is entitled to use the "asset basis" of the Alabama Rock Asphalt, Inc., in computing the deductions allowable from gross income for the taxable year on account of depreciation and depletion.

(17) The Board of Tax Appeals erred in failing to decide and determine what provisions, if any, of the applicable statutes, provide for the "basis" allowed to the taxpayer herein.

(18) The Board of Tax Appeals erred in holding

and deciding that the taxpayer is entitled to depreciation and depletion for the year 1934 in the respective amounts of $21,630.63 and $6,019.58.

(19) The Board of Tax Appeals erred in holding and finding that the creditors of the old corporation received the capital stock of the taxpayer in exchange for their claims against the old corporation.

(20) The Board of Tax Appeals erred in failing to hold and decide that the noteholders' committee purchased the assets at the trustee's sale free from all liens and debts except taxes, and that it represents the predecessor owner or transferor of the assets of the taxpayer.

(21) The Board of Tax Appeals erred in failing to hold and find that the cost of the assets to the noteholders' committee, which was the price paid at the sale, is the basis which must be used for depreciation and depletion purposes.

(22) The Board of Tax Appeals erred in failing to hold and decide that the taxpayer is not entitled to deductions from gross income for the year 1934 for depreciation and depletion in excess of the respective amounts, to-wit: $13,522.71 and $593.56.

(23) The Board of Tax Appeals erred in ordering and deciding that there is a deficiency in income tax due from the taxpayer for the taxable year 1934 only in the amount of $210.65.

(24) The Board of Tax Appeals erred in failing to order and decide that there is a deficiency in income tax due from the taxpayer for the taxable year 1934 in the amount of $2,236.56.

WHEREFORE, the Commissioner petitions that said findings of fact and opinion and decision of the United States Board of Tax Appeals be reviewed by the Circuit Court of Appeals for the Fifth Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said court and be transmitted to the Clerk of

said court for filing, and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said court.

(SIGNED) SAMUEL O. CLARK, JR.
Assistant Attorney General.

(Signed) J. P. Wenchel
J. P. Wenchel, RLW
Chief Counsel,
Bureau of Internal Revenue.

OF COUNSEL:

CLAUDE R. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.

CRM/csl
4/18/40

UNITED STATES OF AMERICA,
} SS
DISTRICT OF COLUMBIA.

CLAUDE R. MARSHALL, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to these matters he believes it to be true.

(SIGNED) CLAUDE R. MARSHALL
Claude R. Marshall.

Sworn and subscribed to before me
this 7th day of May, 1940.

(SIGNED) GEORGE W. KREIS
Notary Public

My commission expires November 15, 1942.
CRM/csl 4/18/40

Received May 21 1940
U. S. Board of Tax Appeals

United States Board of Tax Appeals
Filed May 21 1940

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. ALABAMA ASPHALTIC LIMESTONE COMPANY, Respondent on Review.	B.T.A. Docket No. 91793.

NOTICE OF FILING PETITION FOR REVIEW.

To: Wallace L. Caldwell, President,
Alabama Asphaltic Limestone Company,
Liberty National Life Building,
Birmingham, Alabama.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of May, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fifth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignment of errors as filed is hereto attached and served upon you.

Dated this 13th day of May, 1940.

(Signed) J. P. Wenchel
J. P. Wenchel, RLW
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 17 day of May, 1940.

(Sd) Wallace L. Caldwell
For Respondent on Review.

CRM/csl
5/17/40

Received May 21 1940
U. S. Board of Tax Appeals

United States Board of Tax Appeals
Filed May 21 1940

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. ALABAMA ASPHALTIC LIMESTONE COMPANY, Respondent on Review.	B.T.A. Docket No. 91793.

NOTICE OF FILING PETITION FOR REVIEW

To:

Alabama Asphaltic Limestone Company,
Liberty National Life Building,
Birmingham, Alabama.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of May, 1940, file

with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fifth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated 13th day of May, 1940.

(Signed) J. P. Wenchel
J. P. Wenchel, RLW
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 17 day of May, 1940.

(Sd) Alabama Asphaltic Limestone Co.
by Wallace L. Caldwell, President.

For Respondent on Review.

CRM/csl
4/18/40

Received May 24 1940
U. S. Board of Tax Appeals

United States Board of Tax Appeals
Filed May 24 1940

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. ALABAMA ASPHALTIC LIMESTONE COMPANY, Respondent on Review.	B.T.A. Docket No. 91793.

NOTICE OF FILING PETITION FOR REVIEW

To: James A. O'Callaghan, Esq.,
111 West Washington Street,
Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of May, 1940, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Fifth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of May, 1940.

(Signed) J. P. Wenchel
J. P. Wenchel, RLW
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 18 day of May, 1940.

(Sd) James A. O'Callaghan
Attorney for Respondent on Review.

CRM/csl
4/18/40

Received May 22 1940
U. S. Board of Tax Appeals

United States Board of Tax Appeals
Lodged May 22 1940

United States Board of Tax Appeals
Filed June 5—1940

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. ALABAMA ASPHALTIC LIMESTONE COMPANY, Respondent on Review.	B.T.A. Docket No. 91793.

STATEMENT OF EVIDENCE

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable Sam B. Hill, Member of the United States Board of Tax Appeals, at Birmingham, Alabama, on February 13 and 14, 1939. James A. O'Callaghan, Esq., appeared for the taxpayer and Hart-

ford Allen, Esq., appeared for the Commissioner of Internal Revenue:

Thereupon, there was offered and received in evidence an agreed "Stipulation of Facts," the material portions of which are made a part of the record on review.

Thereupon, there was offered and received in evidence the following Exhibits which were specifically referred to in the Stipulation of Facts, but not made a part thereof:

Exhibit #1—List of noteholders, etc., referred to in Paragraph 3 of Stipulation of Facts.

Exhibit #2—Petition in Bankruptcy, referred to in Paragraph 4 of Stipulation of Facts.

Exhibit #3—Creditor's Appointment of Trustee, referred to in Paragraph 7 of Stipulation of Facts.

Exhibit #4—Balance Sheet of the Alabama Rock Asphalt, Inc., as of December 31, 1930, referred to in Paragraph 8 of Stipulation of Facts.

Exhibit #5—Petition of Trustee for Sale of Property of Bankrupt, referred to in Paragraph 10 of Stipulation of Facts.

Exhibit #6—Correspondence, referred to in Paragraph 11 of Stipulation of Facts.

Exhibit #7—Trustee's Report of Sale of Assets of Bankrupt and Order of Referee Confirming Sale of Assets by Trustee, referred to in Paragraphs 12 and 13 of Stipulation of Facts.

Exhibit #8—Statement of Distribution, referred to in Paragraph 14 of Stipulation of Facts.

Exhibit #9—Balance Sheet of Alabama Asphaltic Limestone Company, as of January 19, 1931, referred to in Paragraph 15 of Stipulation of Facts.

Copies of the aforesaid Exhibits, Nos. 1 to 9, inclusive, are attached hereto and made a part hereof.

Thereupon, Wallace L. Caldwell was called as a witness on behalf of the taxpayer, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

(BY Mr. O'Callaghan):

I reside in Birmingham, Alabama. I am and have been president of the Alabama Asphaltic Limestone Company since its organization in January 1931. Prior to that time, I was president of the Alabama Rock Asphalt, Inc., referred to as the "old company". I was president of the latter company from February 6, 1928 until the company discontinued its business along in January of 1931. I was receiver of that company beginning September 11, 1930, and then trustee of that company, until the termination of the receivership. In response to your question of how I became connected with the Alabama Rock Asphalt, Inc., I will briefly relate: I had been in the Rock Asphalt business up in Kentucky for some years, and I sold out my interest in that business in 1925 and went to New York and was in business there.

In May 1927, L. B. Musgrove, who was connected with the Deep Water Coal & Iron Corporation, whom I had never met before, and L. R. Hardinburg, of New York, who was then president of the Alabama Rock Asphalt, Inc., called on me one day and wanted to know whether I would be interest in taking the presidency of the Alabama Rock Asphalt Company, and I told them at the moment I was not particularly interest.

A short while after that, they called on me again and asked me to give very serious consideration to the matter. In the Fall, probably, in November 1927, I told them I would consider the matter. I told them that up to then I had never had any information as to the status of the company, or what its organization was, what their

capitalization was, or what property they had, and that I would look into the matter.

I came down to Alabama and looked the property over, and it seemed to have some possibilities, and I went back to New York and told them I would like to see their financial set-up, and I found, the first thing I found, was that the organization, the capitalization of the company was incomplete. They had issued stock for the amount of land that was put into the company by the Deep Water Coal & Iron Corporation, but they had never issued any stock for the bulk of the investment, which was several hundred thousand dollars, which had been put into the plant for development expenses, the railroad, the opening of offices, and a sales organization, and I found that that money was represented by a series of notes that from time to time, as they found it necessary to provide new funds, various stockholders of the Deep Water Coal & Iron Corporation put up what funds were needed.

There seemed to be no particular system as to how they put it up, but they would ask one or another of the stockholders, if they needed so many thousand dollars, and they got that money and they were given notes; they were given notes, all maturing the first day of February 1930.

Originally there had been $400,000 of money put up for building the plant, but additional amounts were put up from time to time, and I asked these men—we had a conference a discussion on that very point, with Colonel Musgrove and Mr. L. R. Hardinburg and Mr. Samuel Hill, who had preceded Mr. Hardinburg as president of the Alabama Rock Asphalt, Inc., and he was a very large stockholder in the Deep Water Coal and Iron Corporation.

Well, they said that I did not need to worry, that it is understood between all these parties that those notes will be taken care of by an exchange for some permanent form of security on the date of maturity, February 1, 1930.

I told them that the company had no working capital. I told them that it would be necessary to provide some working capital, and probably quite a little of it, between that date in 1927 and 1930.

"Well," they said, "We will put up what is needed, and we will take notes for it, and then we will know by that time that the development expenses will be completed and we can go ahead and complete the reorganization of the company;" and, I asked them what their plans were for reorganization, and they said they did not know, but would work out some reorganization, in February 1930, that was agreeable to all the noteholders. So, they provided some money, I think, as of February 1, 1928, and I came down here, and I think it was on the 6th day of February, 1928, and took charge of the company's affairs. That is the story of how I came to be connected with them.

I, at no time, had any connection with the Deep Water Coal & Iron Corporation. It was, however, a corporation which had been organized by L. B. Musgrove and certain others to buy a large acreage of undeveloped iron-ore, silica and coal properties in Alabama, and certain developed coal lands, and in buying the various undeveloped mineral lands, or partially developed lands, they acquired the property which was later conveyed by them to the Alabama Rock Asphalt, Inc.

I operated the Alabama Rock Asphalt, Inc., in 1928 and 1929 after I became connected with it; I was president until the receivership in 1930. The receiver was appointed in September 1930.

I will have to go back to explain how the proceedings in bankruptcy came about.

As I have stated, the stockholders who employed me gave me every assurance that there was nothing to give any concern in the uncompleted capital structure of the company; that that would be completed on February 1, 1930.

Well, I, from time to time, had had advances from

various of the noteholders, and we had secured those advances by giving them notes. They expressed themselves, from time to time, that those notes were, in effect, subscriptions to stock, because they expected to take stock for them, and so, I think in the latter part of—in the middle of 1929, I had some discussion with some of the noteholders as to just how they were going to proceed. If they had arrived at any plan that they wanted to use for reorganization. I discussed with them that it would be manifestly impossible for the corporation to pay off practically 100 per cent of its investment in plant and equipment within 3 years after it had been put on an operating basis. Well, they said they knew that and that plan would be worked out, and that, at the right time, a committee would be appointed to represent the noteholders to determine what kind of security they would take for these notes. They just did not know in what form the organization would be completed. It was never contemplated that a new corporation would be organized. It was merely contemplated that additional stock would be issued in the original company.

Late in 1929 a committee of the noteholders, consisting of Mr. Walter Douglas, Mr. John J. Rudolph and Mr. George B. Agnew, of New York, all of them were important noteholders, said they would undertake to represent the noteholders; they had been asked by practically all the noteholders to represent them.

So, on February 1, 1930, this committee decided to form a plan of reorganization. They proposed to issue preferred and common stock for these notes. The plan was formally sent out to the noteholders. It proposed to change one share of preferred and one share of common for each $100 of the notes outstanding, and then, all of the stock of the original company had been issued to the Deep Water Coal & Iron Corporation for the land, and provision was made for issuing them a certain number of shares of stock, and we sent out written,—the reorganization committee asked me to send out notices of the proposed reorganization to the various noteholders, and

asked their assent, and we received the assent of all but two of the then noteholders.

We found that one of the noteholders holding about $40,000 had sold his notes to a third party, and had represented them to him to be a real promissory note to be payable, without doubt, on the day it was due. The man who sold that note knew it was not a real promissory note, but he, nevertheless, sold it.

Another one of the noteholders sold a part of his holdings in a $20,000 note to another innocent party. He had notified us that he sold this note, but he told me that the man who had bought it understood the conditions.

In the case of the first man I described, we did not know of that sale until after we attempted to put the reorganization plan into effect, rather, in the first place, to complete the reorganization was what it really was.

These two noteholders, who were innocent parties, and holders who had nothing to do with the original financing, refused to accept any settlement but payment in cash for their notes. Those noteholders were Edward Roos and Frank Terrace. I had much conversation with these gentlemen. I had never met any of them, but I called them up on the telephone and tried to explain the thing, and I wrote them several letters, and had other people write them, but they never would give their consent to any plan of reorganization or any other settlement than the payment of cash.

Now, the cash to pay the two noteholders, the only place it could come from, was other noteholders, and they positively refused to put up any money to pay those two noteholders, because they said it was never contemplated that they should be paid in cash, in the first place, and they expected to take stock, and if the other non-assenting noteholders would not take stock, why, the other noteholders would not provide cash to pay them. So, that left the situation completely up in the air.

We could not carry out the original intention, and the problem then was how to act.

The reorganization committee told me to employ an attorney here to see what advice he could give. I employed Mr. V. J. Nesbit, of Birmingham, who has since died. Mr. Nesbit then gave some thought to the question, and he said that, under the state of the law, then, the only way he could see out of the thing, and to force a reorganization, was to go through bankruptcy. He said, after much consideration, that he saw no other way out of it; we would have to go through bankruptcy—Section 77-b of the Bankruptcy Act had not been enacted. There was no such remedy as would be available now. He had to act under the laws that would be available then.

So, then, the reorganization committe decided to accept his recommendations. Now, it was not desired that it be an ordinary receivership. Nobody proposed to throw us into bankruptcy.

Mr. Nesbit and I came right down to this court and talked to Judge Grubb, who was then the United States Judge here, and told him the whole thing; told him it was a reorganization plan, and we wanted to ask him if he would appoint me as receiver.

Well, he said he never had appointed an officer of the company, or the president of a company, as receiver; it had been contrary to his policy; but, he said, under the circumstances, and since it was not, since it was, he thought, a reorganization plan, he would appoint me receiver. That was some days before we filed the petition. Considerably ahead of the time, in fact, when we did file the petition.

In the meantime, we were trying, up to the last, we were trying to get the assent of these two noteholders, but they would never assent to the plan. So, finally, on September 11, 1933, a petition in bankruptcy was filed.

Now, it had not been contemplated that the stockholders would file a petition in involuntary bankruptcy,

but the Deep Water Coal & Iron Corporation was a stockholder of record, and they went into receivership just before we did, and they were not in a position to act; they were in a real receivership.

Then, the question was that it would be an involuntary receivership, and I went out and asked three of our creditors, that didn't know anything about it, I asked them would they sign a petition in bankruptcy.

When we told Judge Grubb it was going to be an involuntary receivership, instead of a voluntary receivership, he kind of hemmed and hawed a little bit again, about appointing me as receiver, but then said he thought it would be all right, under the circumstances, and the proof was full, and he did appoint me a receiver with power to operate the company.

The creditors then petitioned that I be appointed trustee, and I was appointed as trustee, until the termination of the receivership.

While I acted as trustee in bankruptcy of the Alabama Rock Asphalt, Inc., and prior to January 8, 1931, I filed a petition asking for the power to sell the assets.

The following arrangements were made concerning the so-called purchase of the assets:

At all times the whole transaction was considered as a part of the plan to complete the organization and reorganization, whatever it might be called, of the original company, and the reorganization committee continued to function, and the reorganization committee was as originally named, but one addition was made, Mr. James R. Sloane of New York, went on. He was the attorney for the receiver of the Deep Water Coal & Iron Corporation.

The reorganization committee then consisted of: Rudolph, Douglas, Agnew and Sloane, and they had indicated that they would provide, from the same group of men, the noteholders, additional funds that might be

needed to pay the expenses of the receivership and the trusteeship, and it was proposed at all times that they—proposed when the receivership plan was started, that they would buy the company in for a new company, which would take over the assets.

It was pointed out by our attorneys that they was about the only way the new company could get real and valid title to the property.

But, before working out the receivership, after the receivership plan was so understood by the Court, the referee in bankruptcy, or the reorganization plan, I mean, the reorganization plan was referred to in many of the documents in the court—well, nearly two weeks before we actually went into receivership, we discussed with Judge Grubb and the referee in bankruptcy the probable value and the upset value, as they termed it, of the property for resale. Now, I wrote the members of the reorganization committee on September 1st, ten days before the receivership was asked for, that the Court would probably approve an upset value of $150,000 for that purpose. I mean for all of the assets of the Alabama Rock Asphalt, Inc., which was the company that was in receivership, and the Court did approve it. Now, one of the main considerations was this: if we had sold those properties at their full value, the referee in bankruptcy would receive a fee of around $7,500, and we told him that we thought that was too much; we thought $1,500 would be enough under the circumstances, and he said he thought so too, and he told us he would approve a sale for $150,000 before the proceedings started, and the letters will show that.

Anyway, the Court authorized me, as trustee, to sell the property, and the reorganization committee bid the property in.

George B. Agnew, whose name appears on Exhibit No. 1, was one of the original noteholders, and was interested in this thing due to the fact that he was a stockholder in the Deep Water Coal & Iron Corporation.

Atwell & Company is the nominee of George B. Agnew. It had some of his notes. It advanced some of the money and some of his stock was held by Atwell & Company, although he is the real owner.

The Deep Water Coal & Iron Corporation, as I mentioned before, was this company which owned the mineral lands. This list here of notes issued in the name of that company represents additional money it had put up in addition to the lands; in addition to the $28,000 and some odd dollars of land.

Walter Douglas was an individual who was a director and also a stockholder of the Deep Water Coal & Iron Corporation. Philip J. Flad was the nominee of A. Iselin & Company and Walter Douglas, jointly. It was in his name. I don't know why that is, but that is the way they did it, and were instructed to issue the stock represented by those notes to this man. L. R. Hardinburg was at that time a director of the Alabama Rock Asphalt, Inc., and he had preceded me as president of the company.

A. Iselin & Company was a firm of private bankers in New York, which was largely interested in this company and the Deep Water Company.

Exhibit No. 1 shows notes in the amount of $80,000.00 in the name of the National Bank of Commerce in New York City. Some funds were borrowed from the National Bank of Commerce in New York City, and it was hoped that those might be paid back. That note was endorsed by the Deep Water Coal & Iron Corporation and guaranteed by A. Iselin and Company, and that note together with the collateral, which was all of the stock of the Alabama Rock Asphalt, had to be deposited as collateral for that note, and at public auction, on January 29, 1930, the note, together with the collateral, was purchased by A. Iselin & Company at the face value of the note. It was the guarantors of the note.

Charles T. Lark is an attorney in New York City, who was interested in the organization of this company originally. Blanche D. Lark is his wife.

L. B. Musgrove is a man in Jasper, Alabama, who was one of the organizers of the Deep Water Coal & Iron Company, who, I think, bought this property for the Deep Water Coal & Iron Corporation.

George Notman is a mining engineer of New York City, who advanced some money.

Edward Roos is a man that Lark sold his $20,000 note to.

John Rudolph was a partner in Iselin & Company, and treasurer of the Deep Water Coal & Iron Corporation.

Stadacoma Corporation is a holding company for Mr. Walter Douglas.

The U. S. Truck Company in Seattle, Washington, was controlled by Mr. Samuel Hill, the first president of the Alabama Rock Asphalt, Inc. Those notes were the ones sold to Frank Terrace.

After January 8, 1931, all these noteholders, or their nominees, except the two non-assenting noteholders, received stock in the new company for their holdings in the old. Roos and Terrace received one share of preferred stock and one share of common stock for each $100 of outstanding notes.

The witness was then shown Exhibit No. 4, which is headed "Alabama Rock Asphalt, Inc., Balance Sheet As Per Books December 31, 1930", and his attention was called to the item on the bottom thereof, namely, "deficit, $331,301.61", and was asked to testify from his own knowledge and contact with the situation, whether or not the stock of the Alabama Rock Asphalt, Inc., had any value. The witness continuing:

The stock was issued as having a value of $210,901.76. This balance sheet shows a deficit, as of December 31, 1930, of $331,301.61, the deficit exceeding the value of the common stock by $121,000, approximately, and therefore, the common stock, as of that date, has no value. At the time of what you call the reorganization,

and after January 29, 1930, the stock of the Alabama Rock Asphalt, Inc., the so-called old corporation, was held by A. Iselin & Company, which bought it in when it bought the note from the National Bank of Commerce. It is my understanding that no stock of the petitioner, the new company, was issued for the stock of the old company to Iselin & Co.: that A. Iselin & Co. did not consider it to be of value. The stock of the Alabama Asphaltic Limestone Company that was issued to A. Iselin & Company represented the amount of the notes which they held, in the amount of $80,000 plus interest on the notes; that is, their other notes.

The date of the petition in bankruptcy was September 11, 1930. No new notes were issued between September 11, 1930 and December 30, 1931. Some receivership certificates were issued, but no corporation notes; that was an administrative matter in the bankruptcy proceedings.

It was agreed by counsel that the balance sheet (Exhibit No. 4) of December 31, 1930 is the same as of the date of the bankruptcy—that there was no change.

On Exhibit No. 3, showing the list of creditors, there is a name of "Hugh M. Morris" or Receiver, Wilmington, Delaware, $120,880.70; he is the receiver of the Deep Water Coal & Iron Corporation.

The assets that were sold while I was trustee went to the Alabama Asphaltic Limestone Company, the taxpayer in this proceeding. The Alabama Asphaltic Limestone Company and the Alabama Rock Asphalt, Inc., operated the same business, and we never stopped operation until today. The stock of the Alabama Asphaltic Limestone Company was issued to the noteholders, as shown in Exhibit No. 8, and the so-called noteholders were paid their proportionate dividend out of the bankruptcy proceedings.

CROSS EXAMINATION

(By Mr. Allen):

I have seen some of the notes. They were ordinary promissory notes. They had various dates, as set forth in Exhibit No. 1, and most of them had a maturity date about February 1, 1930. There were some notes that

matured in 60 and ninety days. The Flad notes were designed to be short-term notes, originally. Mr. Iselin and Mr. Douglas provided that money, and it was hoped that we could pay them off, but we could not pay them off, and when they matured, they said, "We will let them go with the others, and we will take stock for them in 1930." The notes were not considered to be ordinary promissory notes by the holders thereof. There was nothing in the notes to that effect, but that is what the noteholders told me. Many of them told me they expected to take stock for them. I was not a ~~stockholder~~ noteholder myself. Every single noteholder, except those two, told me that there was such an agreement. There never was a written agreement. All I base my knowledge on was what they told me; they were the people who put up the money and they knew about it, and knew what they expected to get back—how they expected to get it back. I felt sure there was an agreement to that effect; they told me that there was.

The witness, having identified a copy of a letter dated February 3, 1930, from Mr. Wallace L. Caldwell, president, to Mr. Edward L. Roos (page 13 of Exhibit No. 6), continued: When I used the term "I think" in that letter in the sentence "It was, I think, always understood that the money represented by those notes would be converted into some other form, etc.," I thought, and I think it now; I did not have any doubt about it. I would not have come with the company at all, in the first place, if I had not thought so. I was present at several conferences among the note holders in which they said that was their understanding. It was wholly based upon their statements. I will state there were many cases where things might have been done, which they did not do, and they left the organization uncompleted, and that was the trouble.

At the maturity dates of some of these notes, no stock was issued by the Alabama Rock Asphalt, Inc., for the notes.

I know that there actually was an appraisal made by

the Court of the assets of Alabama Rock Asphalt, Inc. I have read the stipulation of facts in this case, which sets forth an appraisal made. The stockholders of the Alabama Rock Asphalt, Inc., were Iselin & Company and the Deep Water Coal & Iron Corporation, but at the time of the reorganization, only Iselin & Company. Although they were not stockholders of record, they owned the stock, and those stockholders never received anything from the Alabama Asphaltic Limestone Company, the taxpayer herein, upon its organization, in exchange for their stock holdings. The stock of the Alabama Asphaltic Limestone Company was all issued in exchange for notes and no stock of the Alabama Rock Asphalt, Inc., was ever issued to the noteholders by the Alabama Rock Asphalt, Inc.

The Deep Water Coal & Iron Corporation was the original stockholder of the Alabama Rock Asphalt, Inc.; they also were noteholders—their note holdings interest and stockholding interests were kept and listed separately.

REDIRECT EXAMINATION

(By Mr. O'Callaghan):

At the time I took over the plant of the Alabama Rock Asphalt, Inc., the so-called old company, it was doing a little business. A larger portion of its equipment was on hand and some of it had not been installed yet. It had shipped two very small orders in 1927. It had one small unit of the plant completed in 1927, and I should say construction was probably 80 per cent completed—but I am not sure.

As far as I know, practically all of the money represented by these notes went into the construction of the plant, the opening up of the quarry, the building of the railroad, and some sales work, overhead, and working capital.

The $40,000.00 liability to A. Iselin & Company on the balance sheet of the Alabama Asphaltic Limestone Company (Exhibit No. 9) at January 19, 1931 was bor-

rowed, if I recall it, by the reorganization committee for the account of the Alabama Asphaltic Limestone Company, the so-called new company, to take care of the expenses of the reorganization, and to provide some working capital for the so-called new company. A. Iselin & Company advanced that money for that purpose. That was while the reorganization committee was functioning. The reorganization committee began to function in the latter part of 1929. The first communication they sent out was on February 1, 1930. The purpose of their creation was to carry out this reorganization we have discussed here. It was recognized that the company was completely up in the air. They had failed to complete their financial structure and reorganization was designed to try to carry through the organization into some logical conclusion.

At the time the Petition in Bankruptcy was filed, I selected and asked the creditors to file it. It was agreed that $150,000 was to be the set-up value, and the Court stated that that was the lowest figure it would approve.

(There being no further witnesses, both parties rested.)

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue,

(Signed) J. P. Wenchel
J. P. Wenchel, RLW
Chief Counsel,
Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

_____

Attorney for Respondent on Review.

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this 5th day of June, 1940.

(s) Sam B. Hill

Member, United States Board of Tax Appeals.

CBM/csl 5/20/40

EXHIBIT 1

Date of Note	Date of Maturity	Note Issued In Name of	Amount of Note	
2/1/27	2/1/30	George B. Agnew	$ 50,000.00	
2/1/29	2/1/30	" " "	13,000.00	
2/1/29	2/1/30	" " "	8,214.21	
8/1/29	2/1/30	" " "	2,492.50	$ 73,706.71
2/1/29	2/1/30	Atwell & Company	50,000.00	
2/1/29	2/1/30	" " "	7,000.00	
2/1/29	2/1/30	" " "	7,683.21	
8/1/29	2/1/30	" " "	2,263.91	$ 66,947.12
2/1/28	2/1/30	Deepwater Coal & Iron Corp.	114,990.48	
8/1/28	2/1/30	"	4,069.27	
2/1/29	2/1/30	"	1,749.02	$120,808.77
1/29/28	2/1/30	Walter Douglas	5,000.00	
2/1/28	2/1/30	" "	1,562.16	
3/2/28	2/1/30	" "	5,000.00	
6/14/28	8/14/28	Phillip J. Flad	9,000.00	
8/1/28	2/1/30	Walter Douglas	348.88	
8/14/28	2/1/30	Phillip J. Flad	105.00	
2/1/29	2/1/30	Walter Douglas	416.89	

Date of Note	Date of Maturity	Note Issued In Name of	Amount of Note	
2/1/29	2/1/30	Phillip J. Flad	302.74	
8/1/29	2/1/30	Walter Douglas	431.48	
8/1/29	2/1/30	Phillip J. Flad	329.27	$ 22,496.42
1/20/27	2/1/30	L. R. Hardenbergh	5,000.00	
2/1/28	2/1/30	" " "	5,088.23	
8/1/28	2/1/30	" " "	357.01	
2/1/29	2/1/30	" " "	365.59	
3/1/29	2/1/30	" " "	378.38	$ 11,189.21
2/1/27	2/1/30	A. Iselin & Company	150,000.00	
1/23/28	2/1/30	" " " "	5,000.00	
2/1/28	2/1/30	" " " "	14,771.38	
3/2/28	2/1/30	" " " "	5,000.00	
6/14/28	8/14/28	Phillip J. Flad	9,000.00	
8/1/28	2/1/30	A. Iselin & Company	6,123.59	
8/14/28	2/1/30	Phillip J. Flad	105.00	
2/1/29	2/1/30	A. Iselin & Company	6,331.33	
2/1/29	2/1/30	Phillip J. Flad	302.74	
8/1/29	2/1/30	A. Iselin & Company	6,552.92	
8/1/29	2/1/30	Phillip J. Flad	329.27	$203,516.23

Date of Note	Date of Maturity	Note Issued In Name of	Amount of Note	
1/14/29	4/14/29	+National Bank of Commerce in New York City	10,000.00	
"	"	"	10,000.00	
"	"	"	10,000.00	
"	"	"	10,000.00	
"	"	"	10,000.00	
"	"	"	10,000.00	
"	"	"	5,000.00	
"	"	"	5,000.00	
"	"	"	5,000.00	
"	"	"	1,000.00	
"	"	"	1,000.00	
"	"	"	1,000.00	
"	"	"	1,000.00	
"	"	"	1,000.00	$ 80,000.00

+This note was secured by endorsement of Deepwater Coal & Iron Corporation and whose endorsement was secured by the common stock of the Alabama Rock Asphalt, Incorporated. The note, together with the collateral, was purchased by A. Iselin & Company at public auction on January 28, 1930.

Date of Note	Date of Maturity	Note Issued In Name of	Amount of Note	
2/16/27	2/1/30.	Charles T. Lark	1,250.00	
2/1/28	2/1/30	Blanche G. Lark	85.51	
8/1/28	2/1/30	" " "	46.74	
2/1/29	2/1/30	" " "	48.39	
8/1/29	2/1/30	" " "	50.07	$ 1,480.71
1/20/27	2/1/30	Charles T. Lark	5,000.00	
2/1/28	2/1/30	" " "	368.20	
3/20/28	2/1/30	" " "	4,000.00	
8/1/28	2/1/30	" " "	303.25	
2/1/29	2/1/30	" " "	338.50	
8/1/29	2/1/30	" " "	350.35	$ 10,360.30
2/1/28	2/1/30	L. B. Musgrove	2,618.93	
8/1/28	2/1/30	" " "	91.66	
2/1/29	2/1/30	" " "	94.87	
8/1/29	2/1/30	" " "	98.20	$ 2,903.66
2/1/27	2/1/30	George Notman	2,500.00	
2/1/28	2/1/30	" "	178.06	
8/1/28	2/1/30	" "	94.77	
2/1/29	2/1/30	" "	97.05	
8/1/29	2/1/30	" "	100.46	$ 2,970.34

Date of Note	Date of Maturity	Note Issued In Name of	Amount of Note	
2/16/27	2/1/30	Charles T. Lark	20,000.00	
2/1/28	2/1/30	Edward Roos	1,368.15	
8/1/28	2/1/30	" "	747.88	
2/1/29	2/1/30	" "	774.06	
8/1/29	2/1/30	" "	801.15	$ 23,691.24
1/20/27	2/1/30	John J. Rudolf	5,000.00	
2/1/28	2/1/30	" " "	368.20	
8/1/28	2/1/30	" " "	189.96	
2/1/29	2/1/30	" " "	194.54	
8/1/29	2/1/30	" " "	201.34	$ 5,954.04
1/31/27	2/1/30	Stadacona Corporation	60,000.00	
2/1/28	2/1/30	" "	4,905.29	
8/1/28	2/1/30	" "	2,296.87	
2/1/29	2/1/30	" "	2,352.08	
8/1/29	2/1/30	" "	2,434.40	$ 71,988.64

Date of Note	Date of Maturity	Note Issued In Name of	Amount of Note	
1/20/27	2/1/30	U. S. Trust Company Seattle, Wash.	5,000.00	
1/29/27	2/1/30	" " " "	25,000.00	
2/1/28	2/1/30	" " " "	2,163.92	
8/1/28	2/1/30	" " " "	1,138.22	
2/1/29	2/1/30	" " " "	1,165.58	
8/1/29	2/1/30	" " " "	1,206.37	$ 35.674.09
				$733,687.48
		Add: Interest accrued on books in 1930—		22,192.00
		Balance Per Books, September 11, 1930		$755,879.48

Above list includes notes aggregating approximately $100,000.00 issued for semi-annual interest.

EXHIBIT 2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

TO THE HONORABLE W. I. GRUBB, JUDGE:

The Petition of Roberts & Son, Inc., a corporation, R. A. Brown & Company, Inc., a corporation, and Crandall Engineering Company, Inc., a corporation, all of the City of Birmingham, Alabama, respectfully shows:

That the Alabama Rock Asphalt, Inc., a corporation, in said District, has for the greater portion of six months next preceding the date of the filing of this Petition, had its principal place of business at Birmingham, in the County of Jefferson, in said District, and is a corporation, organized under the Laws of the State of Alabama, engaged principally in trading, manufacturing and mercantile pursuits.

That the said Alabama Rock Asphalt, Inc. owes debts to the amount of One Thousand ($1,000.00) Dollars and over, and is insolvent and is neither a wage earner nor a person engaged principally in farming or the tillage of the soil.

That Your Petitioners are creditors of the said Alabama Rock Asphalt, Inc., having provable claims against it in excess of the value of securities held by them, to Five Hundred ($500.00) Dollars; and that neither of Your Petitioners is entitled to priority of payment on its said claims within the meaning of the Bankruptcy Law as amended, nor has either of Your Petitioners received a preference within the meaning of such Law as amended.

The nature of Your Petitioners' claims are as follows:

Roberts & Sons, Inc. by open account;	$ 203.17,
R. A. Brown & Company, Inc. by open account;	$1,439.90,
Crandall Engineering Co., Inc. by open account;	$ 38.48,

That within four months preceding the filing of this Petition, viz; on the 29th day of August, 1930, the said Alabama Rock Asphalt, Inc., while insolvent, committed an act of bankruptcy in that it did, while insolvent, transfer to one or more of its creditors a portion of its property with intent to prefer such creditors over its other creditors, to-wit; the said Alabama Rock Asphalt, Inc., while insolvent, did on said day pay over to Mexican Petroleum Company the sum of Three Hundred ($300.00) Dollars, with intent to prefer such creditor over its other creditors.

WHEREFORE, Your Petitioners pray that service of this Petition, with a subpoena, may be made upon Alabama Rock Asphalt, Inc., a corporation, as provided by the Bankruptcy Law, as amended, and that it may be adjudged a bankrupt within the purview of such Law.

ROBERTS & SONS, INC.,

BY Jas. G. Smith
President

R. A. BROWN & COMPANY, INC.,

BY J. L. Orr
Vice President

CRANDALL ENGINEERING CO., INC.,

BY E. A. Crandall.
President

NESBIT & SADLER,
ATTORNEYS FOR PETITIONERS.

STATE OF ALABAMA }
JEFFERSON COUNTY }

James G. Smith, as President of Roberts and Sons, Inc., J. L. Orr, as Vice President of R. A. Brown and Company, Inc., E. A. Crandall as President of Crandall Engineering Company, Inc., petitioning creditors mentioned and described in the foregoing Petition, do hereby severally make solemn oath as such officers that the statements of fact contained in the foregoing Petition are true to the best of their knowledge, information and belief.

Jas. G. Smith, Pres.
J. L. Orr, Vice-Pres.
E. A. Crandall, Pres.

subscribed and sworn to
before me this 10th
day of September, 1930.

Grady W. Patterson
Notary Public for
Jefferson County, Alabama.

Exhibit 3

APPOINTMENT OF TRUSTEE BY CREDITORS.
IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

In the Matter of } In Bankruptcy
Alabama Rock Asphalt, Inc. }
Bankrupt. } No. 32461

At Birmingham, Alabama, in said District, on the 1st day of October A. D. 1930
Before George P. Bondurant, Referee in Bankruptcy:

This being the day appointed by the Court for the

first meeting of creditors in the above bankruptcy and of which due notice has been given in the _____, we, whose names are hereunder written, being the majority in number and in amount of claims of the creditors of the said Bankrupt, whose claims have been allowed, and who are present at this meeting, do hereby appoint Wallace L. Caldwell of Birmingham in the County of Jefferson, and State of Alabama, to be the Trustee, of the said Bankrupt's estate and effects.

Signature of Creditors.	Residence of Same	Amount of Debt.
A. Iselin & Co.	New York City, N. Y.	$219,749.68
George Agnew	" " " " "	$ 79,585.89
Walter Douglas	" " " " "	$ 24,290.72
Stadacona Corporation	" " " " "	$ 77,780.75
A. Iselin & Co.	" " " " "	$ 8,386.70
Atwell & Co.	" " " " "	$ 72,287.11
Hugh M. Morris, or Receiver	Wilmington, Del.	$120,880.70
A. Iselin & Co., Agt.	New York City	$ 88,852.79
John J. Rudolf	" " "	$ 6,428.99
L. R. Hardenbergh	" " "	$ 12,081.72

Ordered, that the above appointment of Trustee be, and the same is hereby approved and Trustee's Bond fixed at twenty thousand ($20,000) Dollars

George P. Bondurant
Referee in Bankruptcy.

EXHIBIT 4

ALABAMA ROCK ASPHALT, INC.

BALANCE SHEET AS PER BOOKS

December 31, 1930

Assets		
Cash		$ 801.11
Accounts Receivable		35,913.34
Inventories		12,636.48
Deferred Charges		12,788.85
Land (Mineral)	$195,629.02	
Buildings, Machinery, etc.	389,080.58	
Exploration & Development	41,327.40	626,037.00
Investment:		
Margerum Rock Asphalt Block, Inc.		100,030.00
Organization Expenses		9,551.70
Total		$797,758.48
Liabilities		
Notes Payable—Current		$ 566.31
Accounts Payable		40,908.25
Long Term Notes		755,879.48
Accrued Interest		37,223.97
Accrued Taxes		1,306.53
Trade Checks		115.30
A. Iselin & Co.—Advances		8,288.63
Reserves for Depreciation & Depletion		73,369.86
Common stock		210,901.76
Deficit (Red)		331,301.61
Total		$797,758.48

The figures shown on the above balance sheet were the cost prices of the assets.

EXHIBIT 5

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

ALABAMA ROCK ASPHALT, INC. } In Bankruptcy

BANKRUPT } No. 32461.

TO THE HONORABLE GEORGE P. BONDURANT, REFEREE IN BANKRUPTCY;

Your Petitioner respectfully shows:

That he is the duly qualified Trustee herein.

That the bankrupt's estate consists of real estate situated in Tishimingo County, Mississippi, and in Colbert County, Alabama, together with the buildings, machinery and equipment used in the manufacture of rock asphalt located therein, stock on hand, accounts and bills receivable.

That it will be of advantage to the estate that such property be sold forthwith, for that the property is being operated at a loss and operation can not be continued and maintained by Your Trustee with the limited resources at his command and unless the property is sold there will be a certain wasting of the estate and for these reasons and other reasons it is of advantage to the creditors that the property be offered for sale.

That no previous application has been made to this or any other court for the order herein asked.

WHEREFORE, Your Petitioner prays for an order permitting him to sell said property free and clear of all liens and encumbrances, excepting taxes, in whole or in parcels, after notice to the creditors, as required by the Bankruptcy Acts.

Wallace L. Caldwell
TRUSTEE
PETITIONER

(Verification omitted)

EXHIBIT 6
(32 Sheets)

January 28, 1930

Mr. E. F. E. Jung
A. Iselin & Company
63 Wall Street
New York City

Dear Mr. Jung:

I have prepared and submit herewith a copy of the balance sheet as of December 31, 1929, following the form as suggested in Mr. Rudolf's letter of January 25th, 1930. Also is attached is a balance sheet giving effect to the reorganization as proposed, on the basis of the December 31, 1929 figures.

We have made the adjustments as suggested in Mr. Rudolf's letter of January 25th. We have also corrected the inventory item to give effect to the actual physical inventories of the plant and quarry supplies, and of the commissary, as of December 31st, 1929, and in addition thereto have added the inventory of advanced stripping, rock shot down and rock drilled as of December 31st. This gives us a total inventory value as of December 31st, 1929 of $14,367.23.

Referring to the item of notes payable, we find that as of December 31st, 1929, the actual current notes payable for trade accounts, salary, and an item of cash advance which I have made, amount to a total of $4,479.88. We have deducted from our current accounts payable the item of the Flad note of $27,315.00, which has heretofore been considered as a current item.

According to my calculations, the actual amount of

notes with accrued interest as of February 1st, 1930 will be as follows:

Total Outstanding Notes as of August 1, 1929	$653 687 78	
Interest Accrued February 1, 1930	22 831 57	
		$676 519 35
Guaranty Trust Loan	80 000 00	
Interest on note to February 1, 1930	4 526 65	
		84 526 65
		761 046 00

According to the above calculations, we shall issue 7,610.46 shares of both common and preferred stock to enable us to completely close the transaction.

If there is any error in my calculation of this item, or if the records do not agree with yours, will you be kind enough to wire me upon receipt of this letter.

Very truly yours,
President

WLC:MS

CC: Mr. J. J. Rudolf

A true copy of letter from Wallace L. Caldwell to E. F. E. Jung Dated January 28, 1930.

Received Oct 20 1938
Technical Staff

WESTERN
UNION

1930 FEB 1 AM 9 59

NEWYORK NY
WALLACE L CALDWELL
PIONEER BLDG
DIRECTORS PARENT COMPANY AT MEETING TODAY AGREED TO REORGANIZATION AND LETTER AND PLAN CAN NOW BE MAILED WITH THE CHANGES WIRED YOU LAST NIGHT
RUDOLF.

A true copy of telegram from J. J. Rudolf to Wallace L. Caldwell, dated February 1, 1930.

ALABAMA ROCK ASPHALT, INC.
Birmingham, Alabama

BALANCE SHEET

Giving effect to reorganization outlined in attached plan, the balance sheet, on the basis of December 31, 1929 figures, will be approximately as follows:

ASSETS

Current Assets		
Cash on Hand and in Banks	$ 2 452 63	
Accounts Receivable	51 896 04	
Inventories	14 367 23	
Total Current Assets		$ 68 715 90
Freight Claims Receivable		9 200 30
Capital Assets		
Plant, Buildings, Machinery, Investments, etc., Less: Depreciation and Depletion		670 786 54
Deferred Charges		26 312 49
		775 015 23

LIABILITIES

Current Liabilities		
Notes Payable	4 479 88	
Accounts Payable	51 506 26	
Trade Checks Outstanding	105 65	
Accrued Property Taxes	1 957 59	
Total Current Liabilities		58 049 38
Capital Stock and Surplus		
7611 Shares preferred stock, no par value		
8261 Shares common stock, no par value represented by		716 965 85
		$775 015 23

A true copy of proposed balance sheet of Alabama Rock Asphalt, Inc.

ALABAMA ROCK ASPHALT, INC.
BIRMINGHAM, ALA.

BALANCE SHEET
AS OF DECEMBER, 31.
1929

ASSETS

Current Assets		
Cash on Hand and in Banks	$ 2 452 63	
Accounts Receivable	51 896 04	
Inventories	14 367 23	
Total Current Assets		$ 68 715 90
Freight Claims Receivable		9 200 30
Capital Assets		
Plant, Buildings, Machinery, Investments, etc., Less: Depreciation and Depletion.		670 786 54
Deferred Charges		26 312 49
TOTAL ASSETS		$775 015 23

LIABILITIES

Current Liabilities		
Notes Payable (Trade)	$ 4 479 88	
Accounts Payable	51 506 26	
Trade Checks Outstanding	105 65	
Accrued Property Taxes	1 957 59	
		$ 58 049 38
Notes Payable Matured or Due February 1, 1930	733 687 78	
Interest Accrued Thereon	23 302 30	
		756 990 08
Capital Stock, 6500 Shares no Par Value	210 901 76	
Less: Deficit	250 925 49	
		40 024 23
TOTAL LIABILITIES		40 024 23

A true copy of Balance Sheet of Alabama Rock Asphalt, Inc. As of December 31, 1929.

REORGANIZATION PLAN

ALABAMA ROCK ASPHALT, INC.

The present company will change its capitalization (or if counsel so advise, a new company will be organized to acquire all the business, property and assets subject to liabilities—of the present company) so that it will be as follows:

7611 shares Preferred, without par value
8261 shares Common, without par value

The preferred stock will be $7 Dividend Cumulative Stock, with sinking fund, callable at 110, and not entitled

to vote. The common stock will have the exclusive voting power.

7611 shares of the preferred stock, being the entire authorized amount thereof, and 7611 shares of the common stock of the corporation will be issued to the noteholders in extinguishment of all outstanding notes and/or interest accrued thereon on the basis of one share of preferred stock and one share of common stock for each $100 of principal amount of notes and/or accrued interest thereon.

650 shares of the common stock will be issued to the present stockholders in exchange for the entire present outstanding stock.

Condition

This plan will be effective only when agreed to by all the holders of the notes of an aggregate principal amount of $733,687.78 amounting with interest accrued to February 1, 1930, to $761,046.00, which are due on or before February 1, 1930. There are no other notes outstanding (other than $4,479.88 Trade Notes Payable) nor any mortgage or funded debt.

If the necessary consents are received, the noteholders will be notified and advised where to send the notes for exchange.

Dated Birmingham, Alabama, February 1, 1930

The undersigned agrees to the plan of reorganization as above outlined and will accept preferred and common stock on the basis set forth in said plan dated February 1, 1930, in exchange for the $_____ principal amount of notes of the present company and interest accrued thereon owned by the undersigned.
Dated _____, 1930

A true copy of Reorganization Plan, Dated February 1, 1930

ALABAMA ROCK ASPHALT, INC.

Pioneer Building

Birmingham, Alabama

February 1, 1930

TO THE NOTEHOLDERS OF ALABAMA ROCK ASPHALT, INC.

Dear Sirs:

The Alabama Rock Asphalt, Inc., after several years of effort, has now reached a period where profitable operation may reasonably be expected. The deposits of raw material and the production facilities are ample and adequate; overhead has been reduced to the lowest point consistent with sound management. The volume of business which a careful, conservative estimate shows as necessary to meet expenses (except interest on loans) is approximately 40,000 tons per annum. Last year the deliveries amounted to 33,344 tons, and we are confident that we will exceed the minimum requirement this year, 17,012 tons being already delivered or on our books for delivery in 1930.

This accomplishment would have been impossible without your patient help and we now approach you, not for further advances, but to ask your unanimous agreement to an internal reorganization which will not only enable us to continue operations, but will put us in a sound financial condition for doing so.

Obligations of the company represented by notes aggregating with accrued interest $761,046.00 will be due on February 1, 1930, and we will not be able to meet these obligations. Without your unanimous cooperation we are then faced with receivership and liquidation, which will completely destroy the good will which we have succeeded in creating, and would result in the noteholders receiving but little, if anything, on their notes. Our latest balance sheet is enclosed, from which you may see the net asset position of the company. While some

of the notes are guaranteed by Deepwater Coal and Iron Corporation, the financial condition of the latter is such that it is in no position to make good its guarantee and legal action thereunder would only result in incurring useless expense to noteholders.

In the hope that this unfortunate result may be avoided, a plan of reorganization has been prepared which in substance contemplates a recapitalization of the company and the issuance to the noteholders of preferred and common stock of this company, in place of notes which they now hold.

This plan is described in the annexed sheet. Please study it, and if it is acceptable to you, sign one copy and return it to the writer. It will become effective only if ALL the noteholders agree. If they do, the company will then be able, we are confident, to operate profitably without calling on you again.

The writer recommends that you accept this plan, and notify him as promptly as possible. Should you desire any further information or explanation of the plan, please ask at once, as the time is short and the earliest possible action is essential. I have discussed the proposed plan with holders of about 70% of the notes to be funded and have received assurance from them that they will accept the plan, provided all other noteholders do so.

Permit us, whatever your decision, to thank you for the confidence which you have shown in the present management, and to assure you that if permitted to continue the business, we will make every effort to further justify your trust.

Yours respectfully
President

WLC:MS

A true copy of letter from Wallace L. Caldwell, President, to Noteholders, Dated February 1, 1930.

February 1, 1930

Mr. J. G. Gately, Jr., Assistant Treasurer

Guaranty Trust Company of New York

Fifth Avenue Office
New York City

Dear Sir:

In reply to your letter of January 24th, 1930, will you please be advised that the notes issued by this company on February 26th, 1927, payable on February 1, 1930 is one of a series of notes which it is proposed to refund in a reorganization plan which has been presented to the noteholders of this company.

We have communicated in detail with Mr. Charles T. Lark, 527 Fifth Avenue, to whom this note was issued, and have outlined to him the reorganization plan.

Very truly yours,
President

WLC:MS

A true copy of letter from Wallace L. Caldwell, President, to Mr. J. G. Gately, Jr. Dated February 1, 1930.

February 1, 1930

First Seattle Dexter Horton National Bank
Seattle, Washington

Attention: Mr. W. C. Phillips, Ass't Cashier

Gentlemen:

Referring to your two letters of January 7th and January 8th respectively, we wish to advise that the notes referred to are of a series of notes covering advances

made to this company by stockholders of its parent corporation, the Deepwater Coal and Iron Corporation, a total amount of some $733,688.78, which notes constitute practically our entire capital and which were understood to be in the nature of loans which would be refunded at maturity on February 1, 1930.

We attach hereto copy of a reorganization plan which has been submitted to all of the noteholders, including the United States Trust Company of Seattle, and to Mr. Samuel Hill, of that company.

Regarding the interest note, please be advised that records indicate that interest notes have been mailed to the United States Trust Company on the following dates and in the amounts mentioned:

August 1, 1928	$1,138.22
February 1, 1929	1,165.58
August 1, 1929	1,206.37

These notes were positively issued and were mailed to the United States Trust Company of Seattle by the Treasurer of this company. We do not however know anything as regards their present whereabouts, although of course our records indicate their existence of such interest obligations.

Very truly yours,

President

WLC:MS

A true copy of letter from Wallace L. Caldwell, President, to First Seattle Dexter Horton National Bank, Dated February 1, 1930.

WESTERN
UNION

1930 FEB 3 PM 2 13

NEWYORK NY

WALLACE L. CALDWELL

PLEASE FORWARD LETTER AND REORGANIZATION PLAN TO EDWARD ROOS CARE STANTHONY HOTEL SANANTONIO TEXAS MENTIONING PAPERS SENT AT REQUEST OF CHARLES T LARK STOP FOR YOUR INFORMATION LARK SOLD ROOS TWENTY THOUSAND DOLLARS NOTES AND HE IS ONE OF THE TWO PARTIES WHO MIGHT MAKE TROUBLE

RUDOLF

A true copy of telegram from J. J. Rudolf to Wallace L. Caldwell, Dated February 3, 1930.

ALABAMA ROCK ASPHALT, INC.
Pioneer Building
Birmingham, Alabama

February 3, 1930

Mr. Edward Roos
St. Anthony Hotel
San Antonio, Texas

Dear Sir:

At the request of Mr. Charles T. Lark, we are sending you herewith a letter and reorganization plan of this company.

We are advised by Mr. Lark that he has sold to you

a note of this company, maturing February 1, 1930, in the amount of $20,000.

We believe that the attached data will explain the plan in detail. However, it may be well to give you a little further history as to the past organization. At the time this company was organized the land upon which we are operating was put in at a cash value by the Deepwater Coal and Iron Corporation, who took in return therefore all of the common stock of the company. The remaining capital was supplied by various stockholders of the Deepwater Coal and Iron Corporation, who took in return therefore notes of the company maturing February 1, 1930. The sums of money represented by these notes was used for the construction of our plant and for the development of the business. It was, I think, always understood that the money represented by these notes would be converted into some other form of security of the company at maturity, so that the financial structure of the company might be put on a firmer basis.

There is no possibility of the company's paying off these notes, but we are getting into a position to make money from now on, and if you can consistently do so, we will greatly appreciate your consideration of, and acceptance of, the attached reorganization plan.

If we can in any way give you any further information which you may need in enabling you to reach a decision, we will appreciate the opportunity of communicating with you further.

Respectfully yours

President

WLC:MS

A true copy of letter from Wallace L. Caldwell, President, to Mr. Edward Roos, Dated February 3, 1930.

STADACONA CORPORATION
99 JOHN STREET
NEW YORK

February 4, 1930.

Alabama Rock Asphalt, Inc.,
Mr. Wallace L. Caldwell, President,
Pioneer Building,
Birmingham, Ala.

Dear Sir:

Stadacona Corporation as holder of notes of the Alabama Rock Asphalt, Inc. is now in receipt of letter of Wallace L. Caldwell, President, dated February 1, 1930, addressed to the Alabama Rock Asphalt, Inc. note-holders and enclosing two copies of the reorganization plan of Alabama Rock Asphalt, Inc.

This matter was discussed with Mr. John J. Rudolph and we telegraphed to Mr. Walter Douglas, President of Stadacona Corporation of Delaware, and we today have the following telegram from Mr. Walter Douglas,

> "Your wire approve of your action in handling Alabama Rock Asphalt matter Please authorize Guaranty Trust Company to deliver my stock Iselin & Company also I approve reorganization plan both myself and recommend it for Stadacona Company (Corporation)"

On the recommendation of Mr. Walter Douglas Stadacona Corporation, per its Vice President, Mr. Paul Armitage, has today signed the reorganization plan, and we now enclose the same herewith in the air mail envelope which you sent us.

You will note that the amount of principal and interest to be surrendered by the Stadacona Corporation is left blank. No doubt this will all be equitably worked out if the plan goes into effect.

We have had no advices of recent interest credited on account of these loans.

Yours very truly,

STADACONA CORPORATION,
(Signed) F. C. Maurer
Assistant Treasurer.

FCM:IC

A true copy of letter from Stadacona Corporation to Mr. Wallace L. Caldwell, President, Alabama Rock Asphalt, Inc.; dated February 4, 1930.

POSTAL TELEGRAPH

February 20, 1930.

FRANK TERRACE

c/o CARNATION MILK PRODUCTS CO.
SEATTLE WASHINGTON

I UNDERSTAND FROM CALDWELL PRESIDENT ALABAMA ROCK ASPHALT HE HAS NOT YET RECEIVED YOUR WRITTEN ACCEPTANCE TO PLAN OF REORGANIZATION ALL NOTE HOLDERS EXCEPT YOURSELF AND ONE SMALL HOLDER IN TEXAS HAVE DEFINITELY AGREED STOP AS PLAN OF REORGANIZATION ONLY POSSIBLE MEANS OF SAVING COMPANY AND AS OUTLOOK FOR COMPANY GOOD IF REORGANIZED WOULD LIKE YOU TO WIRE ME YOUR AGREEMENT AND SEND ON YOUR WRITTEN ACCEPTANCE TO COMPANY AT BIRMINGHAM PROMPTLY AS ACTION CANNOT BE DELAYED COMPLIMENTS.

L.R. HARDENBERGH.

A true copy of telegram from L. R. Hardenbergh to Frank Terrace; dated February 20, 1930.

COPY

New York City,
May 23rd, 1930.

Mr. Frank Terrace,
Lyon Building,
Seattle, Washington.

Dear Frank Terrace:

Mr. Wallace Caldwell is here in my office and hears me dictate this.

As I wrote you, I have every confidence in Mr. Caldwell's integrity and ability. I have gone over the matter of the Rock Asphalt Company and think I understand it thoroughly, and I agree with his conclusions.

If the notes are exchanged for stock, Mr. Caldwell has the promise of the bank to loan him funds to carry on. At present, with overdue notes, the bank will not loan money. If the notes are exchanged for stock, he can go ahead.

As I told you, he cannot use the Company's money to buy your stock, but he did say and now says he will find a purchaser for $1,000 of your stock at par.

If the company goes into the hands of a receiver, all the assets will be lost. Mr. Caldwell has business in sight if he can get these notes converted into stock, and the Company can go ahead.

Mr. Caldwell is a practical man—not a rainbow chaser—and I think he understands the situation very well. If I were in your place, I would make the exchange.

I write you thus frankly as I know Mr. Caldwell, and believe it is for your interest as well as his.

Yours truly,

Sgd. SAMUEL HILL

SH:B
cc—Mr. Caldwell.

A true copy of letter from Mr. Samuel Hill to Mr. Frank Terrace, dated May 23rd, 1930.

ALABAMA ROCK ASPHALT, INC.
Pioneer Building
Birmingham, Alabama

June 26, 1930

Mr. Edward Roos
c/o Mr. Gus E. Mauerman
Smith Tower
San Antonio, Texas

Dear Mr. Roos:

I regret that I did not reach you on the 'phone in time enough to permit me to come to Texas to confer with you on the matter of the reorganization of this Company. However, I appreciate the opportunity of my telephone conversation with you, and as you suggested, I am writing you further and as instructed am sending a copy of this correspondence to Roosevelt and O'Connor of New York.

In order that you may review the whole plan of reorganization and again refresh your memory on the various matters I have heretofore brought to your attention, I am sending you herewith copies of my letters of February 1st, February 21st and April 5th, together with copy of the balance sheet of the Company as of December 31st, 1929 and a balance sheet giving effect to the reorganization plan as proposed, also a copy of a form of acceptance of the reorganization plan.

The problem is this, in as brief form as I can state it. The bulk of the money which has been put into the Alabama Asphalt Company, in fact all of the money which has gone into plant construction and development expense, has been advanced by various noteholders, which notes were to mature February 1st, 1930, at which time it was generally understood that the notes would be exchanged for some form of permanent financing. In short, your position is exactly the same, or at least the position of Lark, who originally made this advance on the notes which you now hold, was the same as that of the other noteholders who, as of February 1st, 1930, had advanced

a total of $761,046.00. It is utterly and absolutely impossible to provide any funds for the payment of any of these notes, for the reasons which I explained to you over the 'phone. Therefore, the only solution of the matter, the only way in which the noteholders entire interests can be protected, is for this reorganization plan, as outlined in our letter of February 1st, to be carried out. Otherwise, the Company will have to be liquidated and that very shortly, since in the event of our failure to carry out this reorganization plan immediately, we can not carry the Company on. In the event of liquidation the noteholders will be very fortunate to secure ten cents on the dollar. If we are able, however, to complete the reorganization plan we will, in due time, be able to conserve and protect the interests of the noteholders. In no other way can their interests be protected.

The only way that I can see whereby any cash might be secured on your notes is by the plan I outlined to you. Namely, that I will try to sell $5,000 of your stock on the same basis that it might be issued to you. I will see what I can do at once on this matter, and if I am able to secure takers for $5,000 of your stock when, and if issued, under the reorganization plan, I trust that you will consent to sign the acceptance of the reorganization. I will advise you as soon as I am able to find a purchaser for this amount of stock. There is no possibility of disposing of any amount in excess of $5,000 at this time I know.

That would leave the balance of your investment in the form of stock in the Alabama Rock Asphalt, Incorporated instead of in the form of the note as at present. Ultimately it will be the purpose of the Company to retire its preferred stock and in the meantime it is hoped that a dividend will be paid on that stock.

I can quite well realize that when you made this loan to Mr. Lark you were under the impression that it was a temporary loan and that it would be repaid at maturity without any doubt whatsoever. However, such

was not the case as a matter of fact. I wish that I could find the funds to take care of your note in full, but you will realize that the other noteholders who are in precisely your position would not readily consent to a special handling of any particular note even though we had the funds, but since we do not have any funds for the purpose, there is simply nothing to do but to urgently recommend that it will be to your best interest to proceed with the reorganization plan.

I explained to you somewhat my own personal position in the matter and the fact that I felt that I was acting for the best interests of each and every noteholders in recommending that this plan be carried out.

Wih my kind regards, I am

Very truly yours
President

WLC:MS

Cc: Roosevelt and O'Connor
New York City, N. Y.

A true copy of letter from Mr. Wallace L. Caldwell, President, to Mr. Edward Roos; dated June 26, 1930.

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612 N. Michigan Avenue
Chicago, Illinois
August 22, 1930

Re: Reorganization Plan

Mr. V. J. Nesbit
American Traders Natl. Bank Building
Birmingham, Alabama

Dear Val:

I have mentioned to you from time to time the plan of reorganization of Alabama Rock Asphalt, Inc. which it was desired to carry out as of February 1, 1930. I attach copy of the letter outlining the plan of reorganiza-

tion, together with balance sheets both before reorganization and giving effect to reorganization, all of which data was sent out to the noteholders of this Company.

As of February 1, 1930, there was outstanding a total of $756,999.08 of these notes. Two holders, representing a total of $61,443.12, have refused up to this date to agree to the reorganization plan, although all of the other noteholders, amounting to 91.9% of the total outstanding notes, have given written consent to the reorganization plan.

Parties in New York who are interested, particularly Mr. Rudolf and Mr. Douglas, have about concluded that it is useless to wait much longer to attempt to carry through the reorganization plan as originally outlined. It is, therefore, proposed to see what other steps can be taken towards bringing about a necessary reorganization which will convert these notes into permanent invested capital stock of the Company as was contemplated when the notes were first issued.

As I recall it, you mentioned to me some months ago when I first discussed the matter with you, that you felt if such a plan were presented to the Federal Court under proper proceedings that the Court would order the acceptance of the plan by all noteholders. If this is the case, I had in mind that probably we could ask for a voluntary receivership and simultaneously submit to the Court the proposed reorganization plan, with the request of 91.9% of the noteholders that the plan be put into effect. I presume then that the Court, if it had the power, would order such reorganization plan to be carried out and discharge the receivership upon completion of the necessary steps for putting the plan into effect.

Will you please give thought to this matter and kindly address me at 612 North Michigan Avenue, Chicago, as to what in your opinion could probably be done under the circumstances and the necessary steps which might have to be taken to bring about such a plan?

In the event such a scheme cannot be carried out,

we will probably wish to have a voluntary receivership established on or about September 15, 1930, and thereby straighten out the affairs of the Company through the due process of the receivership. The principal creditors will ask for my appointment as Receiver. This is the plan which was discussed with you more than a year ago and at that time you felt there would be no doubt but that upon proper request being filed with the Federal Court that I would be appointed Receiver as requested.

I will be back in Birmingham some time next week, possibly the latter part of the week. In the meantime, I would be glad if you would give me in brief here at Chicago any suggestions you have.

With kind personal regards,

Sincerely yours
President

WLC:M
Encls

A true copy of letter from Wallace L. Caldwell, President, to V. J. Nesbit; dated August 22, 1930.

NESBIT & SADLER.
American-Traders Building
Birmingham, Ala.

August 26, 1930.

Mr. Wallace L. Caldwell,
612 North Michigan Ave.,
Chicago, Ill.

Dear Mr. Caldwell:

Your letter of August 22nd was received and I would have answered the same sooner but it was necessary to see the proper authorities and get their assurance that you would be appointed receiver. I have this assurance.

The method I would suggest for a reorganization looking toward the conversion of the indebtedness represented by the note-holders into capital stock is as follows:

The company would file a voluntary petition in the Federal Court requesting that it be adjudicated a bankrupt. Immediately the note-holders would file a petition asking for your appointment as receiver with the power of operation. This being done, notice would be sent to all creditors of the fact of adjudication and of a meeting of the creditors for the election of a trustee. Representing the majority in amount we would vote for your election as trustee. The law requires that a trustee shall be elected by the vote of a majority in numbers and amount of creditors. We have the amount but considering the trade accounts I doubt if we have the majority in numbers unless we can secure their cooperation, which as I understand it, can be done. The note-holders representing $61,443.12, would have no say so in these proceedings unless they could secure a majority in numbers of creditors voting for some other person than yourself as trustee. In this event the appointment of a trustee would be left to the Referee in Bankruptcy and I have his assurance that unless something very unusual develops he will appoint you. This is of course for our own consumption.

The trustee having been appointed, the next step would be an application for sale of all of the assets of the company free of liens and encumbrances and clear of the statutory right of redemption with an up-set price to be agreed upon. By up-set price I mean the minimum price that would be acceptable to the court in view of the value of the property and for the protection of the creditors who did not join in the reorganization plan. At this sale the bidding is open to everyone.

A new corporation would be organized and to this corporation the note-holders participating in the reorganization plan would transfer their notes in return for the capital stock of the corporation. This new corporation owning this indebtedness would bid at the sale and

purchase the property unless there were other creditors bidding such a high price for the property that it was decided to let them have it. It would not be necessary for the new corporation to pay all cash, for the amount of the purchase price could be credited with the dividends to be received by the new corporation based upon the ratio of the purchase price to the indebtedness owned by the corporation. Should any other person bid in the property they would have to pay cash, except that should the $61,443.12 note-holders bid, they would likewise be credited with their dividend upon that amount, which of course would be very small when compared to the other indebtedness. This practically places the purchase of the property in our hands unless some other person wished to make a very large cash payment. Of course the higher the purchase price, the greater the dividend for the non-cooperating note-holders, and it would be our object to hold down the purchase price as low as possible.

The new corporation would also offer to the non-participating note-holders the right to participate in the reorganization by accepting stock of the new company for their claims. Otherwise they would be limited to the amount of the dividend represented by the ratio of the purchase price to the total indebtedness.

It is also my understanding that the trade notes and accounts would be taken care of by the new corporation in full. This would have to be handled with care for I doubt the advisability of suggesting to the trade accounts that they would be paid in full unless this could be done in such a manner that it would not come to the notice of the non-participating note-holders, for they might raise the question of an unfair method of reorganization and cause us some trouble. It would therefore be desirable to liquidate these trade accounts as far as possible and leave the outstanding accounts in the hands of our friends. The above plan when consummated would leave the title to all properties owned by the Alabama Rock Asphalt, Inc., in the new company, including all real estate, machinery, equipment, notes and accounts receivable, and

cash on hand. The stock of the new company would be owned by the note-holders participating in the reorganization. This method will also eliminate any statutory right of redemption, which is two years under the laws of Alabama.

The above is a brief outline of the plan I would suggest as meeting your present needs for a reorganization. There are of course many details that would have to be worked out but I am sure these can be done satisfactorily.

Very truly yours,

(Signed) V. J. Nesbit

FOR NESBIT & SADLER.

VJN-vd

A true copy of letter from V. J. Nesbit to Wallace L. Caldwell; Dated August 26, 1930.

August 28, 1930
Re. Reorganization Plan

Mr. John J. Rudolf
C/o A. Iselin & Company
40 Wall Street
New York City

Dear Mr. Rudolf:

Shortly after our recent conference in New York, I submitted to Mr. V. J. Nesbit by letter a complete outline of the reorganization plans which we had discussed. He has been in touch with the necessary authorities before the Federal Court at Birmingham and has received their assurance that upon suitable application I would be appointed Receiver for the Company.

I quote below letter received from Mr. Nesbit today, outlining his suggestions as to the reorganization:

(Letter next attached from Nesbit to Caldwell; dated August 26, 1930, quoted in full)

I am to have a conference with Mr. Nesbit on August

29 to discuss in further detail some of the problems and will again write you after this conference.

Very truly yours
President

WLC:M

A true copy of letter from Wallace L. Caldwell to John J. Rudolf, dated August 28, 1930.

ALABAMA ROCK ASPHALT, INC.
Pioneer Building
Birmingham, Alabama

August 29, 1930

Mr. J. J. Rudolf
A. Iselin & Company
40 Wall Street
New York City

Dear Mr. Rudolf:

I acknowledge receipt of your letter of the 27th outlining a plan of reorganization for this company, suggesting that we proceed with this reorganization.

I have had a long conference with Mr. Nesbit today and submitted him detailed information upon several points which he required data on and have another conference with him tomorrow, at which time I hope that he will be able to submit to us a detailed outline of the precise steps that he suggests be taken.

Mr. Nesbit has had further conversations with the proper authorities here, and apparently there is no doubt but that the plan can be handled in accordance with our desires in all respects.

Very truly yours,
President

WLC:MS

A true copy of letter from W. L. Caldwell to J. J. Rudolf; dated August 29, 1930.

ALABAMA ROCK ASPHALT, INC.
Pioneer Building
Birmingham, Alabama

September 1, 1930

Mr. J. J. Rudolf
A. Iselin & Company
40 Wall Street
New York City

Re: Reorganization Plan

Dear Mr. Rudolf:

With reference to my various conversations with Mr. Nesbit, regarding the proposed reorganization through a receivership, I thought that you would be interested in a brief outline of the procedure which we now suggest.

1. The first step will be a filing of a petition of involuntary bankruptcy, which petition will be filed by three creditors. It is suggested that the creditors be L. R. Hardenbergh, J. J. Rudolf and Roberts & Son, of Birmingham a general creditor. The involuntary receivership proceeding will have to be adopted inasmuch as the stockholders of the company, which in this case is the Deepwater Coal & Iron Corporation, will probably not act in the requesting of a voluntary receivership.

2. The next step to be followed is a petition for the appointment of a receivership, with power to operate the property. It is suggested that this petition be signed by the three creditors submitting the petition for bankruptcy, together with such other important creditors, including A. Iselin & Company, as we have.

3. The next step will be a meeting of creditors, who will be notified of the bankruptcy proceedings by the referee in bankruptcy. This meeting will take place three weeks after the appointment of a receiver. At this meeting the trustee will be elected. A petition will have to be submitted to the referee by certain creditors that I be appointed trustee, but this petition will not neces-

sarily govern, since the trustee is elected and must have a majority of creditors both in number and in amount. The referee, however, has certain discretion in the matter, so that there is no doubt but that the election of the trustee can be controlled.

4. The trustee will then submit to the court a petition for the sale of the property and for the establishment of an upset value upon the property. We will try to hold this upset value as low as may be possible, but a referee and the court indicate that under the circumstances they might not be able to consider an upset value of less than $150,000.00.

5. A creditors committee would then be organized and all notes and claims would be deposited with this committee. These claims would be used for the purpose of part payment of purchase price of the property. In the meantime the reorganization plan would be submitted to the noteholders by the creditors committee.

6. The next step after the creditors committee had their plans completed and reorganization plan arranged for, would be the purchase of the property by the creditors committee. A two weeks advertisement would be required prior to this sale of the property by the trustees. It would be provided that the creditors committee could purchase this property with the privilege of transferring the properties and assets to a corporation to be organized by the creditors committee.

7. The next step would be the organization of a new corporation to carry out the terms of the purchase, the qualification of the corporation in Alabama, and the transfer to that corporation by the creditors committee of all assets.

These steps in general are the essential steps in the proposed procedure. Mr. Nesbit states that a minimum of five weeks time will be required and that as a matter of fact about sixty days time would be required from the

time the petition was filed until the transfer of the assets to the new corporation.

There is one point that we must consider before going ahead with this plan and that is the item of expense. I have tried to determine what finally might be fixed as expenses by the court in these proceedings.

Dividends to non participating noteholders and general creditors	$12,500.00
Preferred claims	2,500.00
Referee in bankruptcy expense	2,000.00
Attorneys expense	5,000.00
Court fees and receiver's fees	7,500.00
Organization of new corporation	2,000.00
	31,500.00

Of course the payments that were made to general creditors and to preferred claims would merely be payment of debts which are due in any event and the receiver' and trustee's fees I would simply credit on my salary account, but the item of dividends to non-participating stockholders, referee in bankruptcy fees and attorneys' fees and expense of organization of a new corporation which, together, might amount to in the neighborhood of $18,000 would require cash. This still would not give the new company money for a Cold Mix plant and for some additional working capital which is badly required. Incidentally our Cold Mix plant which we have been using is about on its last legs. We have been trying to mix the Georgia State Highway Department order for the past several days, but it has gone very slow due to constant breakdowns and we are in bad with the Georgia Highway Commissioners as a result.

In short, we can not carry through this reorganization plan according to a receivership without spending some money and it seems to me that perhaps we had better give some thought to the matter of possible agreement with Roos and Terrace. It might be cheaper in the long run. If we could carry through the receivership

without any expense, it might be best but we can not do that. Of course if Roos and Terrace were forced into the reorganization plan it would eliminate the item of dividends to be distributed to them, thereby reducing the cost of the proceedings.

I am probably going to have to leave town for two or three days tomorrow at noon, hence I am sending this to you air mail special and it may be that I will telephone you again tomorrow morning to discuss the matter with you further.

Very truly yours,
President

WLC:MS

A true copy of letter from Wallace L. Caldwell, President, to J. J. Rudolf; dated September 1, 1930.

ALABAMA ROCK ASPHALT, INC.
Pioneer Building
Birmingham, Alabama

September 2, 1930

Mr. J. J. Rudolf
A. Iselin & Co.
40 Wall St.
New York City

Dear Mr. Rudolf:

I have your telegram of this date advising that Roosevelt and O'Connor inform you that they have no definite instructions from Roos. Therefore I take it that we are not forced to immediate action to avoid possible court proceedings on their part in behalf of Roos.

I note that you will go over the various letters which you have received from me today and that after you have discussed the matter thoroughly will advise me further.

In connection with the operation of receivership I

have gotten the figures together as to the total amount of claims of creditors which will be involved. Upon an assumption of a total upset price of $150,000.00 I endeavored to work out roughly an analysis of the operations of such a receivership which is given here below:

Analysis of Operations of Receivership

Creditors		
Accrued salaries and Wages	$18,467.18	
Less preferred claims	1,430.58	
		$ 17,036.60
Notes payable		4,454.64
Accounts Payable		31,997.85
Long term notes payable		791,611.27
Total Unsecured claims		841,100.36
Total Upset Price		150,000.00
Expenses of Administration		
Referee in Bankruptcy	2,000.00	
Receiver and Trustee	7,500.00	
Attorney	5,000.00	
Miscellaneous Expense	1,500.00	
		134,000.00
Equivalent to $.159 per $1.00 of Unsecured Claims.		
Preferred Claims	$ 1,340.58	
Cash Required for		
Accrued Salaries and Wages	2,708.82	
Notes Payable	72.29	
Accounts Payable	5,087.64	
Non-participating Long Term Notes	10,170.37	
Total to Creditors		$ 19,469.70
Administration Expense		16,000.00
Total Cash Required		35,469.70

It will be noted that the total cash required, including receivership and trustees fees, will be $35,469.70 if the various expenses work out as I have estimated. Of course the item of $7,500 trustee's fee would go on my salary account which would be assumed by the reorganized corporation, but in any event in order to carry through this plan of reorganization there will have to be certain cash provided. It may be that we will not have to pay cash dividends to a good many of the accounts payable, but we will have to provide at the minimum the other expenses of administration other than the receiver's fees.

I have assumed of course that Roos and Terrace would not participate, in the event of their non-participation Terrace would receive $6,111.63 and Roos would receive $4,058.74 as dividends. In the event that they saw fit to participate, which would seem to me the sensible thing to do on their part, this item of expense would of course be eliminated, but the total expense would boil itself down to the expenses of administration and such cash dividends as had to be paid upon other accounts payable.

Very truly yours

President

WLC:MS

P.S. Our accounts receivable, including claims for railroad freight refunds amount to about 24,000.00

A true copy of letter from Wallace L. Caldwell, President, to Mr. J. J. Rudolf; dated September 2, 1930.

OFFICE OF A. ISELIN & CO.
40 Wall Street
New York, September 4, 1930.

Box 2
Wall Street Station
Mr. Wallace L. Caldwell, President,
Alabama Rock Asphalt, Inc.
Pioneer Building,
Birmingham, Alabama.

My dear Mr. Caldwell:

I acknowledge receipt of your letters of August 28th, 29th, 30th, September 1st and 2nd regarding the proposed plan of reorganization.

I am sending a copy of your letters of September 1st and 2nd to Mr. Cleveland Dodge and Mr. George B. Agnew.

Referring to your letter of September 1st:

1)— Please have prepared the petition of involuntary bankruptcy and send the same here. Mr. Hardenbergh has agreed to sign the same, but for reasons well known to you, I would prefer if you could find another creditor in Alabama to sign in my place.

2)— If you will forward to me the petition for the appointment of a receivership, I will endeavor to have the various creditors up here sign the same. It might be advisable to leave the date of both petitions in blank, to be filled in by you when both are completed.

3)— The steps, as outlined by you under 3 to 7 can be taken care of in due time. I am hopeful, however, that the up-set price might be fixed somewhat lower than $150,000.

In your letter of September 2nd, you estimate the amount of cash required at $35,000 which, as far as I can see, does not include any provision for installation of your Cold-Mix plant nor working capital. Allowing $6,000 for the first item and about $9,000 for the second,

it will bring the total amount to $50,000 as maximum amount to be underwritten. While this does not give you a large amount of working capital, the Company would, on the other hand, be free of indebtedness and, in addition will have receivables and freight claims amounting to a total of $24,000. I hope that we will be able to reduce the amount mentioned above very considerably through the acceptance by Roos and Terrace, and some of the general creditors, of the securities provided under the plan of reorganization.

As soon as I receive the various petitions and hear from Mr. Dodge and Mr. Agnew, I will communicate with you again.

Yours very truly,

(Signed) John J. Rudolf

JJR/MF

A true copy of letter from J. J. Rudolf to W. L. Caldwell; dated September 4, 1930.

September 13, 1930

Mr. J. J. Rudolf
A. Iselin & Company
40 Wall Street
New York City

Dear Mr. Rudolf:

As I wired you last night, I was yesterday afternoon appointed receiver for Alabama Rock Asphalt, Inc. by Judge William I. Grubb, in Federal Court.

Our petition in bankruptcy was filed September 11th. We met a little snag, inasmuch as Judge Bondurant, referee in bankruptcy, through whom our case will be

handled, was ill. We had previously discussed the matter with both he and Judge Grubb but Judge Grubb indicated that he thought we were discussing a voluntary bankruptcy. He stated that it has never been his practice to appoint the people connected with the corporation as receivers in the event of involuntary bankruptcy. However, we were able to prevail over his objections and my appointment was formally made and an order entered on September 12th.

I am closing the books of the Alabama Rock Asphalt, Incorporated, as of September 11th, and from there on will keep the books in the name of the receiver.

We will submit reports to the referee promptly as required and notices to creditors will be mailed out by the referee. It will possibly be about three weeks before a creditors meeting is called, that is, a creditors meeting will take place in about three weeks from this date. At the creditors meeting I will be elected trustee if I present a substantial majority of the creditors voting for me. The receiver will then turn the property over to the trustee who will operate the properties until sold to the creditors committee and conveyed to a new corporation.

I hand you herewith a clipping from the Birmingham Age-Herald under date of September 12th, 1930. This publicity refers to the receivership of the Deepwater Coal and Iron Corporation. It mentions incidentally that a receivership had been asked for by creditors of the Alabama Rock Asphalt, Inc. We ourselves have had very little publicity, except incidentally as the Deepwater has had publicity.

We understand, unofficially, that the Deepwater receiver and Colonel Musgrove, who is in town, had expected that the proceedings of the Deepwater Coal and Iron Corporation would bring this company under their control. They could have gotten control of this company through a voluntary receivership filed by the Deepwater Coal and Iron Corporation as the stockholder of this company, but by the action which we have taken we have

effectually prevented the Deepwater Coal and Iron Corporation having any control of our corporation.

Very truly yours

WLC:MS

A true copy of letter from Wallace L. Caldwell to J. J. Rudolf; dated September 13, 1930.

CERTIFIED COPY OF RESOLUTION DULY ADOPTED AT A SPECIAL MEETING OF THE BOARD OF DIRECTORS OF

DEEPWATER COAL AND IRON CORPORATION

"WHEREAS this Corporation did heretofore duly endorse the promissory note of its then subsidiary, Alabama Rock Asphalt, Inc., for the sum of $80,000, payable to the National Bank of Commerce in New York (now Guaranty Trust Company of New York City), and as security for the payment of said note did deposit with the payee thereof the entire outstanding capital stock of said Alabama Rock Asphalt, Inc., and

WHEREAS the payment of said note of the Alabama Rock Asphalt, Inc., was further guaranteed by Messrs. A. Iselin & Co., acting for themselves and others; and

WHEREAS Alabama Rock Asphalt, Inc., was unable to make payment of said note when due, and the said stock of said Company deposited as collateral as above mentioned was duly sold at auction on January 29, 1930, for the sum of $84,479.61, being the amount of the principal and interest then due on said note; and

WHEREAS said stock was purchased by Messrs. A. Iselin & Co. acting for themselves and others to protect their guarantee of the payment of said note; and

WHEREAS the purchase of said stock by said Messrs. A. Iselin & Co. has resulted in relieving their

Corporation from its obligation as endorser of said note, subject to the rights of Messrs. A. Iselin & Co. and associates as guarantors or otherwise; and

WHEREAS Messrs. A. Iselin & Co. are willing to sell to this corporation the said capital stock of Alabama Rock Asphalt, Inc., on the terms and conditions hereinafter states; and

WHEREAS said Alabama Rock Asphalt, Inc., has heretofore made certain promissory notes aggregating $378,750, which have been duly endorsed by this Corporation and which are now due and payable, and which the said Alabama Rock Asphalt, Inc., is unable to pay; and

WHEREAS this Corporation is itself also the holder of certain notes of Alabama Rock Asphalt, Inc., in the sum of $120,808.77, which are also due and which Alabama Rock Asphalt, Inc., is unable to pay; and

WHEREAS, a reorganization of said Alabama Rock Asphalt, Inc., is necessary and desirable to enable said Company to continue its operations, and to protect the interests of this Corporation, not only with respect to the notes of Alabama Rock Asphalt, Inc., which this Corporation owns, but also to avoid proceedings by the holders of the notes of said Company which have been endorsed by this Corporation, to collect the same from this Corporation; and

WHEREAS Messrs. A. Iselin & Co. have submitted an offer dated January 31, 1930, which reads as follows:

COPY

January 30, 1930

Deepwater Coal & Iron Corporation
New York, N. Y.

Dear Sirs:—

On January 29, 1930, we and associates purchased at public auction, through the Guaranty Trust Company,

acting as our agent, the entire capital stock of Alabama Rock Asphalt, Inc., which had been deposited by you as collateral security for the payment of a note of said Alabama Rock Asphalt, Inc., for $80,000, endorsed by yourselves, payment of which was also guaranteed by us and two associates. We bid this stock in for $84,479.61, the full amount of the principal and interest of the note, in order to protect our guarantee.

Since Alabama Rock Asphalt, Inc., will be unable to meet its obligations which will be due on February 1, 1930, aggregating $761,046, including its notes amounting to $378,750, which have been endorsed by you, a reorganization is necessary to enable the Company to proceed and to prevent a receivership.

In view of the above we hereby offer to sell to you the entire present outstanding capital stock of Alabama Rock Asphalt, Inc., in consideration of your agreement:

(1) to sell, assign and transfer to us all your right, title and interest in the said $80,000 note of Alabama Rock Asphalt, Inc., and/or any right or claim against Alabama Rock Asphalt, Inc., which you may have acquired by subrogation to the rights of the payee of said note, or otherwise, and to deliver to us forthwith the said original note, and

(2) to accept, as stockholder and noteholder, such plan of reorganization of Alabama Rock Asphalt, Inc., as may in our sole discretion seem reasonable and acceptable to us, and provided it is accepted by the holders of an amount of its notes sufficient in our opinion to make it operative, provided however, that you shall be entitled to receive under such plan, in exchange for your notes totalling $120,808.77, stock and/or securities of the reorganization on the same basis as the holders of the notes which have been guaranteed by you.

In addition we will use our best efforts to have included in the reorganization plan a provision whereby you are to receive one share of new common stock for

each ten shares of the present stock, the balance of the new common being issued to noteholders and/or creditors of Alabama Rock Asphalt, Inc., as part consideration for the surrender of their notes and obligations, which surrender would, of course, relieve you of your obligations as endorser.

You agree that we may keep the present common stock of Alabama Rock Asphalt, Inc., as security for the performance of this agreement, and may have the same registered in our name (or the name of our nominee) and you authorize us in your name or in our name but for your account, to vote the same and to execute such consents as stockholders, and/or to make, execute and deliver such instruments as may be necessary or proper to effectuate a reorganization as above outlined, and to exchange or surrender entirely said common stock in accordance with the terms of such reorganization.

It is further understood that in the event such reorganization is not declared operative within one year from date, or in case a receiver is appointed (other than for the purpose of reorganization) of any of the property, business or assets of Alabama Rock Asphalt, Inc., at any time before then, the stock will be delivered to you by us.

This offer is subject to the approval of your Board of Directors.

Kindly indicate below your acceptance and agreement.

Yours truly,

A. Iselin & Co.
By John J. Rudolf

Accepted: February 1, 1930.

DEEPWATER COAL & IRON CORPORATION,
By Charles T. Lark
Vice-President.

NOW, THEREFORE, be it

RESOLVED, that it is for the best interests of this Corporation to accept said offer, which hereby is accepted,

and the proper officers of this Corporation are hereby authorized and directed to accept the same and to do all acts and things, and to execute such instruments of assignments, conveyance or otherwise, as may be necessary to effectuate said agreement, and are hereby authorized and directed to make, execute and issue such proxies, consents or other documents in the name of, and on behalf of this Corporation as noteholder or stockholder in Alabama Rock Asphalt, Inc., as Messrs. A. Iselin & Co. may require to effectuate said agreement and to enable this Corporation to participate in the plan of reorganization referred to in said offer of Messrs. A. Iselin & Co. or in such other plan of reorganization as may be acceptable to Messrs. A. Iselin & Co. and to the holders of the notes of Alabama Rock Asphalt, Inc., which have been endorsed by this Corporation."

I HEREBY CERTIFY the foregoing to be a true and correct extract from the minutes of a special meeting of the Board of Directors of DEEPWATER COAL & IRON CORPORATION, duly called and held on the 1st day of February, 1930, at 537 Fifth Avenue, New York, at nine o'clock in the forenoon.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Corporation this 1st day of February, 1930.

H. L. Starr
Secretary

EXHIBIT 7

TRUSTEE'S REPORT OF SALE OF ASSETS OF BANKRUPT.

Filed as a part of the Referee's Certified Final Record, October 5th, 1931—
W. S. Lovell, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

IN THE MATTER OF ALABAMA ROCK ASPHALT, INC., A BANKRUPT	No. 32461 In Bankruptcy

---

TO THE HONORABLE GEORGE P. BONDURANT, REFEREE IN BANKRUPTCY:

Now comes Wallace L. Caldwell, Trustee of the above named bankrupt, who has duly qualified as such Trustee and reports as follows:

That an order of sale was heretofore made and entered in this cause on to-wit: the 8th day of January, 1931, authorizing and directing a sale at Noon on the 8th day of January, 1931, of all of the property and assets of the bankrupt, of the Trustee in Bankruptcy, and of this Estate in Bankruptcy, both real and personal, free of and from all liens and encumbrances, except taxes.

Pursuant to said order of sale and in strict compliance therewith the Trustee offered at public auction in the office of the Referee at Noon on said January 8, 1931, free of and from all liens and encumbrances, except taxes, all of the property and assets of the bankrupt, of the Trustee in Bankruptcy, and of this Estate in Bank-

ruptcy, both real and personal, and at said sale John J. Rudolf, George B. Agnew, Walter L. Douglas, and James R. Sloan, constituting the Re-organization Committee of the creditors of the said bankrupt, bid for the said property and assets of the bankrupt, of the Trustee in Bankruptcy, and of this Estate in Bankruptcy, the sum of $150,000.00, which was the highest and best bid therefor, and said property and assets were knocked down to the said John J. Rudolf, George B. Agnew, Walter L. Douglas, and James R. Sloan, constituting the Re-organization Committee for the creditors of said bankrupt for the said sum of $150,000.00, that being the highest and best bid and the highest purchase price offered for said property and assets to be sold.

That in part payment of the purchase price the said John J. Rudolf, George B. Agnew, Walter L. Douglas, and James R. Sloan, constituting the Re-organization Committee, have offered to deliver to your Trustee agreements of various and sundry creditors of the bankrupt whereby they agreed to accept preferred and common stock of a Company to be organized for the purpose of purchasing said property and assets of the bankrupt, of the Trustee in Bankruptcy, and of this Estate in Bankruptcy, in full payment and discharge of their claims against the Bankrupt, and have also deposited with your Trustee the sum of $15,000.00 in cash, in part payment of said purchase price, and have offered to pay in cash any balance due of the purchase price which together with the $15,000.00 already paid will be sufficient to pay the cost of administration, all certificates of indebtedness issued by the Receiver and Trustee of said above named bankrupt, all preferred claims and a dividend to the non-assenting creditors who have not joined in and accepted the plan of reorganization which has heretofore been filed in this Court, and a copy of which is hereto attached, when such balance due has been determined by this Court.

That the sum bid for the property and assets of the above named bankrupt, sold as herein set forth, represents the reasonable value of the said property and assets,

in the opinion of your Trustee, and he therefore recommends the acceptance and confirmation thereof.

This 8th day of January, 1931.

Wallace L. Caldwell
Trustee of Alabama Rock
Asphalt, Inc.

Subscribed and sworn to before me
this 8th day of January, 1931.

Lida Luckett
Notary Public.

Filed January 9, 1931,
Geo. P. Bondurant, Referee

EXHIBIT B

ALABAMA ROCK ASPHALT, INC.
REORGANIZATION COMMITTEE

New York, November 29, 1930.

To the Creditors of
Alabama Rock Asphalt, Inc.:

Dear Sir:

Alabama Rock Asphalt, Inc., having been adjudicated a bankrupt, the undersigned have been requested by creditors representing approximately 85% of the total indebtedness of the corporation to act as a committee (without compensation) for the preparation of a plan of reorganization. In view of the depressed conditions prevailing which have been felt acutely in Alabama, it is to be expected that a forced sale of the properties will result in creditors receiving but a small percentage of the amount of their claim. The balance sheet of the Trustee in Bankruptcy as of September 11, 1930, showed $844,788.47 due creditors and noteholders, while the proper-

ties and other assets of the company have been appraised at $155,876.52 by three appraisers appointed by the court.

The development of the company in the past has been hampered by lack of funds and an unusually severe business depression. Nevertheless, substantial progress has been made and it is believed that if reorganized on a basis which will relieve the company of its heavy present indebtedness it will be in excellent position to take advantage of any revival in business and with the return of normal times should be able to operate on a profitable basis. An important highway program in the south is proposed for 1931 and has to a large extent been definitely arranged for. A number of states, counties and municipalities have voted substantial bond issues while others are expected to do so in the near future. Highway construction in the territory which the company serves, is, therefore, likely to be much greater in the coming year than it has been for some years past, and a volume of business materially larger than that of previous years should be available to the company in 1931 if a prompt reorganization puts it in a position to properly compete for this business.

The attached plan of reorganization treats all creditors equally and replacing the present indebtedness of the company by preferred and common stock will leave the company in a sound financial position which should enable it to handle its business on a more economical basis than has been the case in the past.

In order to make such a reorganization possible, however, the unanimous consent of all creditors will be required. Otherwise the only alternative will be a forced sale of the assets which we are informed may result in creditors receiving 15 cents or less on the dollar.

In view of the fact that only through a reorganization will it be possible for creditors to protect their interest in the corporation and avoid the large loss which will otherwise result from a foreclosure sale, we urge the prompt acceptance of the enclosed plan and have attached

hereto a form of assent which we would ask you to sign and send as soon as possible to the undersigned.

Very truly yours,

George B. Agnew,
Walter L. Douglas,
John J. Rudolf,
James R. Sloane,

ALABAMA ROCK ASPHALT, INC.
Reorganization Committee.

Eugene F. E. Jung,
Secretary for the Committee,
40 Wall Street,
New York City.

REORGANIZATION PLAN

ALABAMA ROCK ASPHALT, INC.

A new company with the name of Alabama Asphaltic Limestone Company or some other appropriate name, will be organized under the laws of the State of Alabama to bid in at foreclosure sale all the business, property and assets of Alabama Rock Asphalt, Inc. The authorized capitalization will consist of—

10,000 shares Preferred Stock without par value;
10,000 shares Common Stock without par value.

The preferred stock will be entitled to receive cumulative dividends at the rate of $7 per annum, will be callable at $110 and accrued dividends and its retirement will be provided for by an annual sinking fund. It will not be entitled to vote, except as otherwise provided by Statute, the common stock having the exclusive voting power.

Preferred and common stock of the new corporation will be issued to creditors of the present Alabama Rock

Asphalt, Inc., on the basis of one share of preferred and one share of common for each $100 of indebtedness due them by Alabama Rock Asphalt, Inc., which would require approximately 8,300 shares of preferred stock and 8,300 shares of common stock. The balance of the capital stock will remain in the treasury of the new company to be available for future needs.

Attached is a pro forma balance sheet showing the approximate position of the company giving effect to the reorganization plan. The realty of the company consists of 250 acres of land in Mississippi and 715 acres of land in Colbert County, Alabama, of which, we are informed, 250 acres are workable. There are on the property buildings, machinery and equipment constituting a hot mix asphaltic products plant. In view of the difficulty in establishing valuations for these fixed assets, they have been included in the balance sheet at the values placed on them by the appraisers appointed by the Referee in bankruptcy.

ALABAMA ROCK ASPHALT, INC.
Reorganization Committee.

November 29, 1930.

ALABAMA ASPHALTIC LIMESTONE COMPANY

Successor to

ALABAMA ROCK ASPHALT, INC.

Pro Forma Balance Sheet

Giving effect to reorganization outlined in attached plan and giving effect to values established, as of September 11, 1930, by appraisers appointed by

Referee in Bankruptcy, the balance sheet will be approximately as follows:

ASSETS

Current Assets:		
Cash on hand and in banks	$ 801.11	
Accounts Receivable	15,039.79	
Inventories	8,257.11	
Freight Claims Receivable	7,232.18	
Total Current Assets		$ 31,330.19
Capital Assets:		
Land	$ 19,184.50	
Buildings, Machinery and Equipment	105,361.87	
Total Capital Assets		124,546.37
Deferred Charges:		
Prepaid Taxes	$ 606.16	
Unexpired Insurance	198.96	
Supplies on hand	50.00	
Total Deferred Charges		855.12
Total Assets		$156,731.68

LIABILITIES

Current Liabilities:		
Accrued Property Taxes	$ 1,806.53	
Total Current Liabilities		$ 1,806.53
Capital Stock and Surplus:		
*8,300 Shares Preferred Stock —no par value		
*8,300 Shares Common Stock —no par value represented by	$154,925.15	
		154,925.15
Total Liabilities		$156,731.68

*Approximate number of shares to be issued.

_____ 1930.

Eugene F. E. Jung, Secretary
Alabama Rock Asphalt, Inc., Reorganization Committee,
40 Wall Street,
New York City, N. Y.

Dear Sir:

The undersigned approves the proposed Reorganization Plan dated November 29, 1930, annexed to your letter of the same date addressed to the creditors of Alabama Rock Asphalt, Inc., and agrees to accept preferred and common stock of the new company mentioned in the Reorganization Plan substantially on the basis therein set forth.

You are also authorized, in the name of the undersigned, to take such action as you or counsel may advise to be necessary or proper to effectuate the Reorganization Plan in substantially the form proposed.

The amount of indebtedness of Alabama Rock Asphalt, Inc., to the undersigned is $_____ on account of _____ (here note whether for merchandise, etc.)

Very truly yours,

Name_____
Address_____

ORDER OF REFEREE CONFIRMING SALE OF ASSETS BY TRUSTEE

Filed in Clerk's Office, as a part of the Referee's Certified Final Record, October 5th, 1931—

W. S. Lovell, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

ALABAMA ROCK ASPHALT, INC.	In Bankruptcy
BANKRUPT.	No. 32461.

At Birmingham, in said District, on this the 8th day of January, 1931, before the Honorable George P. Bondurant, Referee in Bankruptcy.

This cause coming on to be heard upon the report of the Trustee of the above named bankrupt that he has, pursuant to the orders of this Court and in strict compliance therewith and with the Acts of Congress relating to Bankruptcy and of the Rules of Conduct of this Court of Bankruptcy, sold all of the property and assets of the above named bankrupt and of the Trustee in Bankruptcy and of this estate in bankruptcy, and the Trustee reporting that in his opinion the sum bid for said property and assets represents the reasonable value thereof and recommending the acceptance and confirmation of said sale, and it appearing that due notice of said Petition for sale has been given to all creditors of the bankrupt and to all persons and parties in interest as they appear upon the schedules of the bankrupt and upon the papers, records and documents in this proceeding as described by the Acts of Congress relating to Bankruptcy, and no opposition being sustained to said sale, it is by the Court considered and ordered as follows:

That said sale to John J. Rudolf, George B. Agnew, Walter L. Douglas and James R. Sloan, constituting the Reorganization Committee of the creditors of Alabama Rock Asphalt, Inc., bankrupt, of all of the property and assets of the bankrupt, of the Trustee in Bankruptcy and of this estate in bankruptcy at and for the sum of One Hundred Fifty Thousand and No/100 ($150,000.00) Dollars, payable as hereinafter set forth, is hereby approved and confirmed by the Court.

The said Wallace L. Caldwell, as Trustee of the above named bankrupt, is authorized and directed to accept the assent and acceptance of those creditors who have joined in and elected to accept the reorganization plan of the reorganization committee, above named, which plan has been duly filed in this Court, and a copy of same attached to the Trustee's Report of this sale, in part payment of the purchase price above stated, to the extent that the dividends upon said claims so tendered to Trustee, as finally allowed and determined by this Court, will pay the said purchase price. The purchaser will pay in addition to the sum of Fifteen Thousand and no/100 ($15,000.00) Dollars, already paid to the Trustee, an additional amount of Twenty-Five Thousand and No/100 ($25,000.00) Dollars which together with the said Fifteen Thousand and No/100 ($15,000.00) Dollars already paid to the Trustee will be used by the Trustee in payment of the cost of administration all preferred claims against the estate, excepting taxes which the purchasers agree to assume and pay, all certificates of indebtedness issued by the Receiver and Trustee of said above named bankruptcy estate and the dividend to non-assenting creditors who have not elected or shall not elect, as hereinafter provided, to accept the plan of reorganization committee.

The purchaser of said property and assets of the above named bankrupt, of the Trustee in Bankruptcy and of this estate in bankruptcy will allow all creditors who have filed their claim in this bankruptcy proceeding on or before March 17, 1931, who shall elect to receive the

stock of the new corporation to be organized by the reorganization committee instead of dividends in cash, to participate in said reorganization plans to the same extent as those creditors who have already filed their assent and election to participate in said reorganization plan. The Trustee will refund to the Reorganization Committee or to such person, firm or corporation as it may direct, the difference between the said sum of Forty Thousand and No/100 ($40,000.00) Dollars in cash paid to the Trustee and the amount necessary to pay the cost of administration, all preferred claims excepting taxes, all indebtedness of the Receiver and of the Trustee of said bankrupt and the dividend to the non-assenting creditors of the bankrupt who have filed and proven their claims in this proceeding on or before March 17, 1931, and who have not elected to join in the reorganization plan, as soon as such amount can be definitely determined by this Court.

The purchase price having been paid, the Trustee is directed to execute a deed conveying to the purchaser or to such person, firm or corporation as they may designate all of the property and assets of the bankrupt, the Trustee in Bankruptcy and of this bankruptcy estate, which deed shall be authenticated by the Referee and such authentication shall be complete and final evidence that the purchase price has been paid in full.

The Court reserves a lien upon the property so to be conveyed until the entire purchase price as determined by this Court has been paid in full.

Geo. P. Bondurant,
Referee.

Filed January 9, 1931,
Geo. P. Bondurant, Referee.

EXHIBIT 8

		Per Cent of Total Claims	Shares of Common & Pref. Stk. Issued	Per Cent of Stock Issued
Note Holders' Claims:				
Accepting Stock:				
George B. Agnew	$ 79,585.89		981.0429	
Atwell & Company	72,287.11		833.8631	
Deepwater Coal & Iron Corp.	129,728.24		1,297.2824	
Walter Douglas	24,290.72		539.0832	
L. R. Hardenburg	12,081.72		120.8172	
A. Iselin & Co.	219.749.68		2,641.8296	
"	88,852.79			
" (advance for which note had not been issued)	8,386.70			
Blanche G. Lark	1,598.80		15.9880	
Charles T. Lark	11,186.69		111.8669	
L. B. Musgrove	3,135.27		31.3527	
Geo. T. Notman	3,207.29		32.0729	
J. J. Rudolf	6,428.99			
Stadacona Corp.	77,730.75		777.3075	
	$738,250.64	88.024%	7,382.5064	95.586%

			Per Cent of Total Claims	Shares of Common & Pref. Stk. Issued	Per Cent of Stock Issued
Accepting Cash:					
Edward Roos (Purchased from Chas. T. Lark	$25,005.00				
Frank Terrace (purchased from Samuel Hill)	38,519.68	63,524.68	7.575		
Total Note Holders		$801,775.32	95.598		
Sundry Creditors:					
Accepting Stock:					
Wallace L. Caldwell (Salary, Etc.)	15,148.87				
Others	18,944.68	34,093.55	4.065	340.9355	4.414
Accepting Cash		2,821.64	.337		
		$838,690.51	100.000%	7,723.4419	100.000%

RECONCILIATION OF NOTES

Balance as shown on books of Alabama Rock Asphalt, Inc. at December 31, 1930			$755.879.48
Add: Interest on notes allowed by Court		$ 59,701.14	
Less: Interest previously accrued and reversed when above amount used		22,192.00	37,509.14
			$793,388.62
Add: Advance by A. Iselin & Company, for which notes had not been issued			8,386.70
Total amount of Note holders			$801,775.32

EXHIBIT 9

ALABAMA ASPHALTIC LIMESTONE COMPANY

BALANCE SHEET AS PER BOOKS

January 19, 1931

Assets		
Cash		$ 6,776.81
Accounts Receivable		27,959.93
Inventories		12,011.97
Land (Mineral)	$195,679.02	
Buildings, Machinery, etc.	342,935.45	
Exploration & Development	28,001.73	566,616.20
Total		$613,364.91
Liabilities		
A. Iselin & Co.		$ 40,000.00
Reserve for Depreciation		70,775.68
*Capital Stock Outstanding:		
7,723.4419 shs. Common, No Par Value)		
7,723.4419 " Preferred, No Par Value)		110,000.00
Capital Surplus		392,589.23
		$613,364.91

*Authorized:

10,000 shares Common, No Par Value
10,000 shares Preferred, No Par Value.

Received May 22 1940
U. S. Board of Tax Appeals

United States Board of Tax Appeals
Filed May 22 1940

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner on Review, v. ALABAMA ASPHALTIC LIMESTONE COMPANY, Respondent on Review.	B.T.A. Docket No. 91793.

PRAECIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Fifth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board:

(a) Petition and attached exhibits filed December 31, 1937.

(b) Answer filed February 28, 1938.

(c) Amendment to Petition and Exhibit attached filed February 13, 1939.

(d) Answer to Amendment to Petition filed February 14, 1939.

3. Statement of Evidence and Exhibits, Nos. 1 to 9, inclusive.

4. Stipulation of Facts filed February 14, 1939.

5. Opinion and findings of fact of Board, promulgated February 14, 1940.

6. Decision of Board entered March 13, 1940.

7. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

8. Any and all orders of enlargement made by the Board with respect to the preparation and transmission of the record on review, not included in record.

9. This praecipe.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Fifth Circuit.

(Signed) J. P. Wenchel
J. P. Wenchel, RLW
Chief Counsel,
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this ..... day of ....., 1940.

.....
Attorney for Respondent on Review.

CRM/csl 4/18/40

(SEAL)

UNITED STATES BOARD OF TAX APPEALS
WASHINGTON.

COMMISSIONER OF INTERNAL REVENUE, Petitioner, v. ALABAMA ASPHALTIC LIMESTONE COMPANY, Respondent.	Docket No. 91793

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 152, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 14th day of June, 1940.

B. D. Gamble,
Clerk,
United States Board of Tax Appeals.

(SEAL)

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and submission

Extract from the minutes of March 4th, 1941

No. 9569

COMMISSIONER OF INTERNAL REVENUE

v.

ALABAMA ASPHALTIC LIMESTONE COMPANY

On this day this cause was called, and, after argument by Maurice J. Mahoney, Esq., Special Assistant to the Attorney General, for petitioner, and James A. O'Callaghan, Esq., for respondent, was submitted to the Court.

Opinion filed May 5, 1941

In the United States Circuit Court of Appeals

For the Fifth Circuit

No. 9569

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ALABAMA ASPHALTIC LIMESTONE COMPANY, RESPONDENT

Petition for review of decision of the United States Board of Tax Appeal (District of Alabama)

(May 5, 1941)

Before SIBLEY, HOLMES, and McCORD, Circuit Judges

SIBLEY, Circuit Judge: Touching income taxes for the year 1934, the taxpayer, Alabama Asphaltic Limestone Company, called herein the new corporation, claimed depreciation and depletion deductions based on the cost of its property to Alabama Rock Asphalt Company, its predecessor in title, called the old corporation. The Commissioner held the proper basis to be the

price bid in 1931 on a sale in bankruptcy by a creditors' committee which had the property conveyed to the taxpayer. The Board of Tax Appeals upheld the basis claimed by the taxpayer thinking there was a reorganization of the old corporation into the new by the acquisition of substantially all of the former's properties by the latter, under Revenue Act of 1928, Sec. 112 (i) (1) (A), which entitled the new corporation to the cost basis of the old. Alabama Asphaltic Limestone Co. vs. Commissioner, 41 B. T. A. 324. Of the facts there found, the most important are that the old corporation was a wholly-owned subsidiary of Deep Water Coal & Iron Corporation, organized in 1927 by the parent company deeding to its subsidiary mineral properties which cost $208,901. for the entire capital stock. The subsidiary had no working capital, and it borrowed some money on the indorsement of the parent company, secured by pledge of the subsidiary's capital stock; but that not being enough, the parent company's stockholders furnished $733,687, on seven percent notes due Feb. 1, 1930, but on an understanding among them all that the notes would be funded into stock or other permanent securities of the subsidiary. Two of the note holders transferred their notes to others who claimed not to be bound by the understanding, refused stock and demanded pay in money. Unwilling to pay them, for the purpose of getting rid of them, the other note holders and creditors had an involuntary bankruptcy started Sept. 11, 1930, in which the subsidiary was adjudged insolvent. It was insolvent according to the books which showed $755,879, besides interest, owing on the notes to the stockholders, besides $8,386 on open account for a similar advancement, and $36,915 due sundry creditors. The book value of assets was about $500,000, but the appraisal put them at $155,876. The parent corporation was itself in an equity receivership. The subsidiary's president was appointed receiver in bankruptcy for the subsidiary, and he was later elected trustee. The bankrupt's business was continued. A plan was formed, in which all creditors joined except the two above referred to, by which a creditors' committee would buy in all the property and business of the bankrupt, and transfer it to a new company, the taxpayer, for its preferred and common stock, to be distributed pro rata to the creditors. The sale occurred accordingly at a price of $150,000. The trustee reported all the circumstances to the court, and that the price was to be paid by the agreement of the creditors to take stock in the new company, except that $15,000 was to be paid in cash to pay expenses of administration, preferred claims and the dividend due nonassenting creditors, with an agreement to supplement the cash if necessary. The plan of reorganization with its acceptances was filed in court. The sale was approved, its terms carried out, the

new corporation formed within a few days, and its stock distributed according to the plan. The stockholders of the parent company, who held the 7% notes above referred to, received 95.586% of the stock, other creditors 4.414%. The old business continued without interruption with the former president at its head.

This was a typical reorganization through a court sale of an insolvent corporation. We think it was a reorganization rather than a gain-and-loss-realizing-sale under the income tax laws. The definitions of reorganizations in Revenue Act of 1928, Sect. 112 (i), contemplate that there be transfers of title by sale. No difference is indicated between a private and a court sale. What is important is the purpose or plan, and the result of the sale, as defined by the statute. We follow the Board in applying the words of Sect. 112 (i) (1): "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of . . . substantially all the properties of another corpotion)." As settled in LeTulle vs. Scofield, 308 U. S. 415, and cases cited on page 420, acquisition by simple sale for cash, or cash and notes or bonds, is not meant, but on acquisition which has the character of a merger, a transfer bodily of the properties of one corporation to another, accompanied by a retention of a "substantial stake", a "proprietary interest", in the acquiring corporation by those interested previously in the properties. The LeTulle case and Helvering vs. Tyng, 308 U. S. 527, settled that such "proprietary interest" is not retained by the transferror becoming a creditor of the acquiring corporation. They are not like the present case, for the whole capital stock here was taken by the transferror. The question here, not present in those cases, is What sort of relationship to the transferring corporation must those have who ultimately receive the stock which is paid to the transferring corporation? Must they be stockholders in the latter?

In the case of a merger, the transferring corporation ceases to do business. What is paid for its properties goes to discharge its debts first, and the remainder to its stockholders, if solvent. When it is confessedly insolvent, or is so adjudged as in this case, the stock is valueless, the assets have become a trust fund for the benefit of the creditors. The officers are trustees and the creditors the beneficiaries. So in bankruptcy, the creditors alone make determinations and control the disposition of the property. The corporation is not dead, it still has title to its properties, but the creditors rather than the stockholders are the beneficial owners. We are of opinion that an insolvent corporation can be merged or reorganized by a transfer of its properties in accordance with the wishes of its creditors, either by act of the corporation or by

a judicial sale by a court acting for that purpose. The consideration, since the business of the old corporation is at an end, will be distributed to its creditors rather than its stockholders, because the proprietary interest in the properties is, since the insolvency, in them. What distinguishes the transaction as a merger rather than a sale is that what is paid for the properties is not money or a money measured obligation, but in whole or substantial part stock in the acquiring corporation, so that the former proprietors of the property continue to have a proprietary interest in it. In this case, but for the two dissenters, there would have been no sale at all, the note holders would have taken stock in the old instead of the new corporation, the former capital stock being ignored or subordinated because of the financial condition of the company. What has happened was not intended by the parties or the court as a sale, but a reorganization by merger. Tax consequences on that basis are in accordance with the truth and justice of the case. Commissioner vs. Southwest Consolidated Corporation, . . . Fed. (2) . . .; Commissioner vs. Kitselman, 89 Fed. (2) 458; Commissioner vs. Newberry L. & C. Co., 94 Fed. (2) 447. The noteholders were in fact informal stockholders in the transferring corporation, according to Arnold vs. Phillips, . . . Fed. (2) . . .

AFFIRMED.

Judgment

Extract from the minutes of May 5th, 1941

No. 9569

COMMISSIONER OF INTERNAL REVENUE

v.

ALABAMA ASPHALTIC LIMESTONE COMPANY

This cause came on to be heard on the petition of Commissioner of Internal Revenue for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court, that the decision of the said United States Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

Clerk's certificate

UNITED STATES OF AMERICA,
United States Circuit Court of Appeals, Fifth Circuit.

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages

numbered from 154 to 160 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 9569, wherein Commissioner of Internal Revenue is petitioner, and Alabama Asphaltic Limestone Company is respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 153 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 7th day of July, A. D. 1941.

OAKLEY F. DODD,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

Order allowing certiorari

Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

FILE COPY

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No. 328

In the Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ALABAMA ASPHALTIC LIMESTONE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ALABAMA ASPHALTIC LIMESTONE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Acting Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above case on May 5, 1941, affirming a decision of the United States Board of Tax Appeals.

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 33–54) is published at 41 B. T. A. 324. The opinion of the Circuit Court of Appeals (R. 154–157) is reported in 119 F. (2d) 819.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 5, 1941 (R. 157). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pursuant to plan, corporate assets were bought in by a creditors' committee at bankruptcy sale. The property was transferred to the taxpayer, a new corporation, which issued its preferred and common stock to participating creditors. The question is whether the basis of the assets for purposes of computing depreciation and depletion is the same as it would be in the hands of the old corporation under Section 113 (a) (7) of the Revenue Act of 1934. The answer depends upon whether the transaction constituted a "reorganization" within the definition of Section 112 (i) (1) of the Revenue Act of 1928.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 7–8.

STATEMENT

Alabama Rock Asphalt, Inc., the taxpayer's predecessor corporation (hereafter referred to as Alabama) was a wholly owned subsidiary of the Deep Water Coal & Iron Corporation. In 1929–

1930 it had outstanding various unsecured notes, issued in return for advances made by individual stockholders of the parent corporation. These notes were to mature February 1, 1930, with the exception of one which was to mature April 14, 1929[1] (R. 34–35).

Following a failure to obtain the agreement of all noteholders to take stock in the company at the maturity of their claims, a creditors' committee was formed late in 1929, and a plan was proposed to which all except two of the creditors assented. The plan provided for the formation of a new corporation, which would acquire Alabama's assets. The stock of the new corporation, consisting of preferred and common stock, would be issued to the old creditors (R. 35–36).

With the assent of the creditors, except for the two dissenters, involuntary proceedings in bankruptcy were instituted on September 11, 1930, and a trustee appointed. The appraised value of the bankrupt's assets was $155,876.52 (R. 36); as of December 31, 1930, its liabilities, consisting of the notes and sundry other obligations, aggregated $838,690.51 (R. 37).

The trustee in bankruptcy offered the assets for sale at public auction on January 8, 1931, and they were bought in by the committee for $150,000 (R. 37). It appears from the trustee's report that the

[1] The latter note was endorsed by the parent corporation and secured by all the stock of Alabama (R. 35).

committee deposited $15,000 in cash, offered to deliver in part payment the agreement of the creditors to take stock of the new company in satisfaction of their claims, and also offered to pay in cash any balance necessary to meet costs of administration, etc., and a dividend to nonassenting creditors (R. 37).

Thereafter, the taxpayer was formed and acquired the bankrupt's assets. In accordance with the plan, its stock was issued to the assenting creditors, representing approximately 92% of the total claims (R. 37–38).

In computing its depreciation and depletion allowances for the year 1936, the taxpayer treated its assets as having the same basis that they had in the hands of the old corporation. The Commissioner, in determining the deficiency, used the cost of the assets to the committee as their basis, namely the price paid at the bankruptcy sale. The Board of Tax Appeals rejected the Commissioner's position, and the court below affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the taxpayer's assets had been acquired in connection with a "reorganization" of Alabama and that, therefore, the basis was the same as it would be in the hands of that company.

(2) In failing to hold that the basis of the assets was the cost to the creditors' committee at the bankruptcy sale.

(3) In sustaining the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

The basic question presented in the case is the same as that involved in *Commissioner* v. *Bondholders Committee, Marlborough Investment Co.*, 118 F. (2d) 511 (C. C. A. 9th), pending on the taxpayers' petition for certiorari, Nos. 128, 129, and *Commissioner* v. *Southwest Consol. Corp.*, 119 F. (2d) 561 (C. C. A. 5th), pending on the Government's petition for certiorari, No. 286. The general importance of the problem in the administration of the revenue laws and the conflict between the Fifth and the Ninth Circuits have been pointed out in the Government's petition in the *Southwest* case.

The considerations for further review have since been accentuated by the decisions of the Circuit Courts of Appeals for the Second and Eighth Circuits in *Commissioner* v. *New Haven & Shore Line Ry Co.*, 1941 Prentice-Hall, par. 62841, and *Commissioner* v. *New President Corp.*, 1941 Prentice-Hall, par. 62831, respectively. In the *New Haven* case (decided July 16, 1941), the court, like the court below, sustained the holding of the Board of Tax Appeals that there was a "reorganization" within the meaning of the revenue laws. In the

New President case (decided July 14, 1941), the court agreed with the Commissioner that there was not a "reorganization", but affirmed the result reached by the Board by adopting as the basis for computing depreciation and gain or loss upon resale of the property its market value at the time of acquisition rather than the price paid for the property at the foreclosure sale.[2]

CONCLUSION

The petition should be granted.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

JULY 1941.

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[2] This result was reached by the application of Regulations 77, Art. 193, and Regulations 94, Art. 23 (k)–3, which provide:

"In addition, where ["if" in place of "where" in Regulations 94] the creditor buys in the mortgaged or pledged property, loss or gain is realized measured by the difference between the amount of those obligations of the debtor which are applied to the purchase or bid price of the property (to the extent that such obligations constitute capital or represent an item the income from which has been returned by him) and the fair market value of the property. The fair market value of the property shall be presumed to be the amount for which it is bid in by the taxpayer in the absence of clear and convincing proof to the contrary. If the creditor subsequently sells the property so acquired, the basis for determining gain or loss is the fair market value of the property at the date of acquisition. * * *"

APPENDIX

Revenue Act of 1928, 45 Stat. 791:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantiallly all the properties of another corporation), * * *

Revenue Act of 1934, 48 Stat. 680:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(7) *Transfers to corporation where control of property remains in same persons.*—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor

upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

* * * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * * *

(U. S. C., Title 26, Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property.

(b) *Basis for Depletion.*—

(1) *General rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * * * *

(U. S. C., Title 26, Sec. 114.)

U. S. GOVERNMENT PRINTING OFFICE: 1941

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No. 328

In the Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ALABAMA ASPHALTIC LIMESTONE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 328

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ALABAMA ASPHALTIC LIMESTONE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 33–54) is published at 41 B. T. A. 324. The opinion of the Circuit Court of Appeals (R. 154–157) is reported in 119 F. (2d) 819.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 5, 1941 (R. 157). The petition for a writ of certiorari was filed July 31, 1941, and was granted on October 13, 1941. The jurisdiction of this Court rests on Section 240 (a) of the Judicial code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pursuant to plan, corporate assets were bought in by a creditors' committee at bankruptcy sale. The property was transferred to the taxpayer, a new corporation, which issued its preferred and common stock to participating creditors. The question is whether the basis of the assets for purposes of computing depreciation and depletion is the same as it would be in the hands of the old corporation under Section 113 (a) (7) of the Revenue Act of 1932.[1] The answer depends upon whether the transaction constituted a "reorganization" within the definition of Section 112 (i) (1) of the Revenue Act of 1928.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 8–10.

STATEMENT

Alabama Rock Asphalt, Inc., the taxpayer's predecessor corporation (hereafter referred to as Alabama) was a wholly owned subsidiary of the Deep Water Coal & Iron Corporation. In 1929–1930 it had outstanding various unsecured notes, issued in return for advances made by individual stockholders of the parent corporation. These notes were to mature February 1, 1930, with the

[1] This section, made applicable by Section 113 (a) (12) of the Revenue Act of 1932, is the same as Section 113 (a) (7) of the Revenue Act of 1934.

exception of one which was to mature April 14, 1929[2] (R. 34–35).

Following a failure to obtain the agreement of all noteholders to take stock in the company at the maturity of their claims, a creditors' committee was formed later in 1929, and a plan was proposed to which all except two of the creditors assented. The plan provided for the formation of a new corporation which would acquire Alabama's assets. The stock of the new corporation, consisting of preferred and common stock, would be issued to the old creditors (R. 35–36).

With the assent of the creditors, except for the two dissenters, involuntary proceedings in bankruptcy were instituted on September 11, 1930, and a trustee appointed. The appraised value of the bankrupt's assets was $155,876.52 (R. 36); as of December 31, 1930, its liabilities, consisting of the notes and sundry other obligations, aggregated $838,690.51 (R. 37).

The trustee in bankruptcy offered the assets for sale at public auction on January 8, 1931, and they were bought in by the committee for $150,000 (R. 37). It appears from the trustee's report that the committee deposited $15,000 in cash, offered to deliver in part payment the agreement of the creditors to take stock of the new company in satisfaction of their claims, and also offered to

[2] The latter note was endorsed by the parent corporation and secured by all the stock of Alabama (R. 35).

pay in cash any balance necessary to meet costs of administration, etc., and a dividend to non-assenting creditors (R. 37).

Thereafter, the taxpayer was formed and acquired the bankrupt's assets. In accordance with the plan, its stock was issued to the assenting creditors, representing approximately 92% of the total claims (R. 37–38).

In computing its depreciation and depletion allowances for the year 1934, the taxpayer treated its assets as having the same basis that they had in the hands of the old corporation. The Commissioner, in determining the deficiency, used as the basis the cost of the assets to the committee, taking as representing the cost, the price paid at the bankruptcy sale. The Board of Tax Appeals rejected the Commissioner's position, and the court below affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the taxpayer's assets had been acquired in connection with a "reorganization" of Alabama and that, therefore, the basis was the same as it would be in the hands of that company.

(2) In failing to hold that the basis of the assets was the cost to the creditors' committee at the bankruptcy sale.

(3) In sustaining the decision of the Board of Tax Appeals.

ARGUMENT

Although this case involves a readjustment effected through bankruptcy, rather than through a receivership proceeding, and the immediate issue is the basis for computing depreciation and depletion, rather than gain or loss, the fundamental problem before the Court is the same as that dealt with in *Commissioner* v. *Southwest Consolidated Corporation*, No. 286, present Term. The Government's position has been fully developed in its brief, filed in that proceeding, to which the Court is respectfully referred.

The Court's attention, however, may appropriately be directed to two points of difference between the two cases, although neither, we submit, warrants a different disposition of the cases:

(1) In the *Southwest Consolidated* case, stock purchase warrants were issued in exchange for stock of the old corporation. Here the former stockholders received nothing at all. This fact would, if anything, strengthen the Government's position in the instant case. In accordance with the views expressed in our *Southwest Consolidated* brief, however, we do not believe the presence or absence of such warrants should affect the determination of the issue involved.

(2) The instant case involves the application of the reorganization definition contained in Section 112 (i) (1) of the Revenue Act of 1928, rather than the definition in Section 112 (g) (1) of the Revenue Act of 1934. Clause A of the

earlier definition referred to "a merger or consolidation (including the acquisition by one corporation * * * of substantially all the properties of another corporation) * * *." The 1934 Act subdivided Clause A into Clauses A and B, reading as follows:

> * * *. (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock * * * of substantially all the properties of another corporation. * * *

Thus, the parenthetical part of former Clause A was replaced by the new Clause B, and the requirement was added that the property must be acquired "in exchange solely for all or a part" of the transferee's "voting stock."

This difference in the language of the relevant statutory provisions may lead to a different conclusion in considering the application to this transaction of the literal language of the statutory definition. If the transaction, following the analysis we have employed in the *Southwest Consolidated* brief, is treated as involving two steps—i. e., (1) the purchase by the committee and (2) the committee's transfer to the new corporation—the transaction still would not come within the language of the Act for the reasons we have there developed. If, on the other hand, the transaction is regarded as involving but one step—i. e., the acquisition by the taxpayer of the assets of the old

corporation in return for a distribution of its preferred and common shares to nonassenting creditors plus a cash payment for dissenters and other expenses—the parenthetical part of Clause A in the 1928 Act, in contrast to Clause B in the 1934 statute, would literally apply.

This conclusion, however, would not alter the ultimate results. The controlling fact is that irrespective of the application of the literal language of the statute, the absence of a continuity in the new corporation of the proprietary interest in the old takes the case beyond its purview. *LeTulle* v. *Scofield*, 308 U. S. 415.

As in the *Southwest Consolidated* case, the Commissioner now takes the position that the new basis should be measured by the market value of the assets rather than the bid price. Government's brief, fn. 5. If the Court agrees that there is no reorganization, further proceedings before the Board of Tax Appeals would be appropriate to determine that market value and to recompute the deficiency accordingly.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. LOUIS MONARCH,
SAMUEL H. LEVY,
Special Assistants to the Attorney General.

DECEMBER 1941.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), * * *

* * * * * *

(j) *Definition of control.*—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * * *

(7) *Transfers to Corporation where control of property remains in same persons.*—If the property was acquired after Decem-

ber 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(12) *Basis established by Revenue Act of 1932.*—If the property was acquired, after February 28, 1913, in any taxable year beginning prior to January 1, 1934, and the basis thereof, for the purposes of the Revenue Act of 1932 was prescribed by section 113 (a) (6), (7), or (9) of such Act, then for the purposes of this Act the basis shall be the same as the basis therein prescribed in the Revenue Act of 1932.

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined

under subsection (a), adjusted as hereinafter provided.

* * * * *

(U. S. C., Title 26, Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property.

(b) *Basis for Depletion.*—

(1) *General rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * * *

(U. S. C., Title 26, Sec. 114.)

The relevant provisions of Regulations 86 under the Revenue Act of 1934 are set forth in the Appendix to our brief in the *Southwest Consolidated* case. Regulations 77 under the Revenue Act of 1932 and Regulations 74 under the Revenue Act of 1928 do not contain provisions material to the question in issue.

Regulations 74, Article 193, corresponds to Regulations 86, Article 23 (k)–3 referred to in Fn. 5 on page 13 of that brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 328

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

ALABAMA ASPHALTIC LIMESTONE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

This is an appeal by the Petitioner, the Commissioner of Internal Revenue, from a decision of the Circuit Court of Appeals for the Fifth Circuit, affirming a decision of the United States Board of Tax Appeals, in favor of the taxpayer, Alabama Asphaltic Limestone Company. Upon application of the Petitioner this Court granted a Writ of Certiorari (R. 159).

Opinions Below.

The opinion of the United States Board of Tax Appeals, promulgated February 14, 1940 (R. 33-54) is published in 41 BTA 324. The opinion of the Circuit Court of Appeals affirming the Board (R. 154-157) is reported in 119 F. (2d) 819.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered May 5, 1941 (R. 157). A Writ of Certiorari was granted by this Court on October 13, 1941 (R. 159). This Court has jurisdiction under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Where all of the assets of an insolvent corporation, were, in pursuance of a Plan of Reorganization, sold at bankruptcy sale to a reorganization committee which immediately transferred, in accordance with the Plan said assets to a newly organized corporation in exchange for all of the latter's stock, which stock was forthwith distributed to noteholders of the insolvent old corporation, who had from time to time advanced money for the notes of the old corporation on the agreement that at the maturity of the notes, stock of the old corporation would be issued to them in payment of the notes: Did this constitute a Reorganization within the meaning of Section 112 (i) (1) and under Section 112 (b) (3) or (4), or a tax-free controlled exchange under paragraph (5) of said Section of the Revenue Act of 1928, so as to give the new corporation the right to use the same cost or basis for depreciation and depletion as the cost or basis of the old corporation, in accordance with Sections 113 (a) (6) (7) or (8) of said Act?

Statutes Involved.

These will be found in the Appendix, *infra*.

Statement.

Note: For brevity and to distinguish the three corporations in this case, they will be designated herein by the same descriptive words as in the opinion of the Court be-

low, namely, the Respondent (taxpayer) Alabama Asphaltic Limestone Company will be called the "new" corporation; its predecessor, Alabama Rock Asphalt, Inc., the "old" corporation; and the old corporation's parent corporation, the Deep Water Coal & Iron Corporation will be known as the "parent" company.

The new corporation claimed depreciation and depletion deductions herein, based on the cost of its property to the old corporation, which basis was denied by the Commissioner, who claimed the proper basis to be the price bid in 1931 at a bankruptcy sale by a creditors' committee, which caused the property to be conveyed to the new corporation (R. 38-9).

The bankruptcy sale was in pursuance of a Plan of Reorganization (R. 35). All of the property of the old corporation, through the sale and the committee, was transferred to the new corporation, in exchange for all of the stock of the new corporation (R. 38, 155). This stock was forthwith distributed to the stockholders and creditors of the old corporation in accordance with the Reorganization Plan. Of these creditors, those receiving 95½% of the new stock were the holders of $733,000 face value of promissory notes of the old corporation, all maturing February 1, 1930 (R. 38, 156). These notes represented $733,000.00 of cash, furnished by the noteholders to the old corporation for working capital (R. 34). These notes were all held by persons, all of whom (excepting two subsequent purchasers of $60,000.00 of notes) were stockholders of the parent corporation (R. 34).

These notes were all issued on the express understanding and agreement between the old corporation and its noteholders, that they were not to be paid at maturity on February 1, 1930 (on which date they all fell due) but were at said maturity date, in pursuance of a Plan of Reorganization, to be exchanged for corporate stock, or other permanent securities of the old corporation (R. 34).

From the time of the organization of the old corporation, these noteholders had planned and agreed to recapitalize and reorganize the corporation in that manner (R. 35).

These notes were all issued to, and held by persons who were stockholders of the parent corporation, which latter, in turn, owned all of the stock of its subsidiary, the old corporation (R. 34-5). At the maturity of the notes, it was found that two of the noteholders had transferred their notes to two strangers, who refused to be bound by the agreement to take stock for the notes at maturity, and who demanded payment in cash for their notes (R. 35). For the purpose of putting through the reorganization plan and necessarily getting rid of these two objectors, and to assure a good title to the assets in the new corporation, the other noteholders caused an involuntary bankruptcy proceeding to be filed against the old corporation, in which proceeding, the sale in question occurred (R. 35). The price of $150,000.00 bid at the sale was an arbitrary sum selected with the approval of the Referee in Bankruptcy to limit his commission of 1% to a reasonable amount, and had nothing to do with the value of the assets (R. 78).

This was all done in accordance with the Reorganization Plan which was filed and approved by the Court (R. 37, 155-6). The old corporation's business was continued, and was not interrupted at any time by the bankruptcy, or the transfer of its property to the new corporation (R. 38, 156).

The President of the old corporation became successively the Receiver, the Trustee in Bankruptcy, and the President of the new corporation (R. 36, 155). The entire stock of the old corporation, being held and owned by the parent corporation, had been pledged by it as collateral on an $80,000.00 note of the old corporation, which note and stock were purchased at about the time of the bankruptcy by a noteholder, which regarded the stock as valueless, and

required no stock of the new corporation to be issued to it, but did receive stock of the new corporation in exchange for the note (R. 35, 147). Stock was also issued by the new corporation to the parent corporation as a noteholder (R. 147).

Minor creditors of the old corporation received about 4½% of the stock of the new corporation; the remaining 95½% of the stock of the new corporation went to all of the noteholders of the old corporation (including the $80,000.00 noteholder above mentioned, who then, by recent purchase, owned all of the stock of the old corporation) (R. 147, 38, 156). All of these noteholders who received new stock, had agreed to take stock for their notes in the old corporation (R. 34, 82). They also owned the old corporation through their being stockholders of the parent corporation, which in turn owned the old corporation (R. 34, 155). All of the stock-owners and creditors of the old corporation received all of the stock of the new corporation (R. 38, 156).

At the time of the reorganization January 1931, all of the stock of the old corporation was owned by A. Iselin & Co. (R. 81), a firm of bankers which was largely interested in the old corporation, and in its parent (R. 79). Iselin & Company came into possession of the stock of the old corporation in the following manner: Some money ($80,000.00) was borrowed by the old corporation from the National Bank of Commerce in New York City. The note was endorsed by the parent of the old corporation, and it was guaranteed by Iselin & Company. With that note the parent deposited as collateral all of the stock of the old corporation. The note was not paid, and the note and collateral were sold about January 29, 1930 to Iselin & Company at face value of the note (R. 79, 81). It was guarantor on the note (R. 79). The stockholders of the old corporation were first, the parent corporation and later, Iselin & Company, but at the time of the Reorgan-

ization, only Iselin & Company. Although it was not of record it owned the stock (83). The parent was the record owner (R. 36).

The total sum advanced (or invested) by the noteholders was $733,687.48 (R. 34). The opening balance sheet of the new corporation as of January 19, 1931 shows total assets of $613,364.91 subject to liabilities of $40,000.00 and a reserve for depreciation of $70,775.68. The fixed depletible assets are shown as $195,679.02, and the depreciable assets $342,935.45 of the total assets (R. 150).

ARGUMENT.

I.

ıe Noteholders of the Old Corporation Must Be Accepted as Stockholders Which Fact Nullifies the Basis of Petitioner's Argument.

We believe that the facts in our case as set forth in the tatement herein, clearly demonstrate that the creditors ıoteholders) of the old corporation must be considered having the *status* of stockholders. If so, our case is ffferent from the other associated cases to be argued fore this Court at this Term.

The Commissioner furnished us with a copy of his brief the *Southwest Consolidated Corporation*, a companion se with ours here. The Commissioner's brief in our se is a skeleton brief, and refers us to his brief in the *uthwest Consolidated* case.

The Commissioner proceeds, in our case, on the theory at our stockholders in the new corporation were merely editors of the old corporation, and that if we have any se at all, we are in the same position as are the bondlders and creditors in the *Southwest Consolidated* and e other associated cases referred to.

If the position of the Commissioner is correct that the ockholders of our new corporation were merely creditors the old, then most of what is argued by the Respondent the *Southwest Consolidated* is applicable to our case.

But our case is a different one from the others. Our ockholders in the new corporation were more than credirs of the old because they advanced money from time to ne to the old corporation for the construction of its

plant, etc., on the agreement that they would receive stock in the old for their advancements, on or about February 1, 1930. They were given notes for their advancements. They were, to all intents and purposes, stockholders of the old corporation. The Board and the Circuit Court so regarded them. The Board in its Finding of Fact 4, at page 34 of the Record said:

> "These loans or advances were made by the stockholders of the Deep Water Corporation upon the express understanding that they would receive stock or securities of the old corporation for the respective amounts so advanced."

The Circuit Court at page 155 of the Record said (referring to the Board's Findings):

> "Of the facts there found, the most important are that the old corporation was a wholly owned subsidiary of Deep Water Coal and Iron Corporation, organized in 1927, by the parent company deeding to its subsidiary, mineral properties which cost the parent $208,901.00, for the entire capital stock. The subsidiary had no working capital and it borrowed some money on the endorsement of the parent company, secured by pledge of the subsidiary's capital stock, but that not being enough the parent company's stockholders furnished $733,687.00, on 7% notes due February 1, 1930 but on an understanding among them all that the notes would be funded into stock or other permanent securities of the subsidiary."

In his argument in the *Southwest Consolidated* case, the Commissioner attempts to reverse the situation in the decision of *Le Tulle* v. *Scofield*, 308 U. S. 415, by urging the same argument that the Court below in our case refused to follow (R. 156), namely, that if the stock of a new corporation in a typical reorganization goes to the creditors of the old insolvent corporation instead of going to its stockholders, then there is not a statutory reorganization.

This argument of the Commissioner, which he urged in

our case below, and he urges in the *Southwest* and other cases here, falls to the ground in our case, because our noteholders must be accepted as stockholders. This is especially true in our case when it is remembered that new corporation stock in our case was also issued to the owners of the stock of the old corporation. We contend, of course, that the Commissioner's argument is unsound even if our noteholders be regarded only as creditors.

That the noteholders in our case should be regarded in the light of shareholders or stockholders of the old corporation is demonstrated by the uncontradicted evidence, the findings of the Board, and the decision of the Court below. These are set forth with page references to the record in our Statement, and will not be repeated here. At the hearing before the Board the Commissioner did not attempt to contradict the facts as found or to introduce any other evidence. The form of the written and verbal proof that the noteholders had agreed to take stock, is not material. It is the actual facts that count. Substance, not form, controls, especially in tax cases. *First Seattle Dexter Bank*, 77 F. (2d) 45. Even the decisions of State Courts support our contention that these noteholders of the old corporation should be regarded as stockholders:

In *Laurson* v. *Memering*, 260 Ill. App. 515 (1931) where the complainant paid a corporation for his stock, which was not delivered, and later the corporation tendered the stock on conditions to which the complainant refused to agree, the Court says (p. 524) that in determining whether or not the transaction was a sale, or an agreement to sell, the facts of the whole transaction must be considered, and that it is not necessary that the agreement be in writing; that it is sufficient, if it can be seen that it was a sale or offer to sell which was so far consummated that the purchaser had paid his money. In our case the noteholders had paid their money in advance for the old corporation's stock, and took

as receipts, notes which they understood would not be paid at maturity.

In *Gibson* v. *Oswalt* (Mich. 1934) 257 N. W. 825, it was held that stockholders who refused to attend a meeting to consider a plan of consolidation of two banks were estopped to deny their statutory liability as owners of stock, the Court saying that subscriptions to corporate stock need not be in any stated form "but may even be deducible from the acts and conduct of a party" (cases cited). The Court further says that a certificate of stock is merely evidence of the ownership of shares; that its possession or issue is not necessary to constitute one a stockholder, and that one may be a stockholder, even if not so recorded on the books of the corporation (cases cited).

In *Rutenbeck* v. *Hohn* (Ia.) 121 N. W. 698, it was held that subscriptions to corporate stock could be made by oral agreement, even though the word "subscribed" involves the idea of a written signature.

In *Gailbraith* v. *McDonald* (Minn.) 143 N. W. 353, where defendant was sued on a note he gave to a corporation for stock, but the stock was not delivered and the corporation became bankrupt, the Court holds that the transaction was a subscription to the stock, and that any agreement by which a person shows an intention to become a shareholder is sufficient to constitute a contract of subscription and that it was not necessary that a certificate for the stock be issued.

Similarly, in the case at bar, the stockholders of the parent corporation who furnished the old insolvent corporation with its capital and received its notes therefor, understood that these notes were not issued as promises to pay money and were not to be paid at maturity. They knew as a fact that the notes could not be paid at maturity, because they all fell due on one day. The monies advanced had been invested in land, buildings and other fixed assets

(Tr. 34). The notes were like informal receipts for money paid in advance for stock or for other permanent securities, to be issued to the noteholders for the notes in a reorganization which was to take place at the maturity of the notes around February 1, 1930.

Further, it will be remembered that the noteholders were all stockholders in the parent corporation, which in turn owned all the stock of the old corporation. In substance, these noteholders were the real parties in interest through the ownership by the parent of its subsidiary, the old corporation. It is obvious that these special facts and circumstances in our case differentiate it from its companion cases at bar, and classify the noteholders in our case not only as creditors entitled to take, own, and control all of the assets of the insolvent corporation, but also as being in the position of stockholders.

II.

The Case of Le Tulle v. Scofield Is Not Applicable Here.

In the *Southwest Consolidated Corporation* brief, the Commissioner relies upon the case of *Le Tulle* v. *Scofield*, 308 U. S. 415, and its accompanying case, *Helvering* v. *Tyng*, 308 U. S. 527, the facts in which are entirely different from the facts in our case; and in his attempt to make the *Le Tulle* case applicable, the Commissioner switches the principles of that case from those applying to a *solvent* assignee to make them apply to an *insolvent* assignor as in our case.

In the *Le Tulle* case, the seller received from the purchaser the latter's cash and bonds, but no stock. It was there held that the seller did not retain any proprietary interest in the purchasing corporation; that there was a sale, and not a reorganization. Furthermore, in the *Le*

Tulle case, the purchaser was *solvent*, its corporate shareholders held stock which was not worthless, and there was no showing or contention in that case that either the seller or purchaser was insolvent, as was the transferor in our case. The point did not arise and was not considered in the *Le Tulle* case whether the bonds received would have been a proprietary interest, if the purchaser corporation had been insolvent, its stock worthless and if the bondholders had become the owners and controllers of the corporate enterprise.

The Commissioner in his argument assumes that a bondholder, or other creditor, after default, or otherwise, can never change his status under any circumstances, from that of a creditor, to one having a proprietary interest or stake in the enterprise, or in its assets.

Our views of the holding in the *Le Tulle* case are not ours alone. They are the holdings of the Circuit Court of Appeals, in *Commissioner* v. *Cement Investors*, 122 F. (2d) 380 (C. C. A. 10, 1941); *Helvering* v. *New Haven R. R.*, 121 F. (2d) 985 (C. C. A. 2, 1941); the instant case in the Court below, 119 F. (2d) 819 (C. C. A. 5, 1941); *Commissioner* v. *Southwest Consolidated Corporation*, 119 F. (2d) 561 (C. C. A. 5, 1941). The Board also so held in *James Q. Newton Trust*, 42 B. T. A. 473; affirmed in 122 F. (2d) 416. There is also respectable authority from learned law commentators who reflect the generally accepted interpretation of the principles laid down in the *Le Tulle* case. Randolph Paul, the learned authority of a leading text-book on Federal taxation, states in his book, "*Studies in Federal Taxes, 3rd Series*", that the *Le Tulle* case merely decides that bondholders in a *solvent* corporation, since they are not equity proprietors, cannot be the conduit for the requisite continuity of interest and that the reasoning of the *Kitselman* case is supported by *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 109. To the same effect is the conclusion of the

learned editor of Commerce Clearing House *Standard Federal Tax Service*, in a very complete and well considered study, covering eighteen pages on the reorganization of corporations, through foreclosures, etc. found in Volume 1 of the 1940 C. C. H. Service, under "Illustrative Cases" beginning on page 63, at pages 75 and 77. An excellent commentary on the reorganization cases now pending before the Court at this term will be found in the December, 1941, issue of the Harvard Law Review, Vol. LV, No. 2, page 292.

In his Brief in the *Southwest Consolidated Corporation* case the Commissioner in his argument on the *Le Tulle* case suggests that "the legal questions should be considered against the background of the practical tax aspects of the problem". This amounts to the argument that his construction of the law should be accepted so that he can collect more taxes. But what of the correlative obligations of the Government and the Commissioner toward the taxpayer? The holders of millions of dollars of bonds of numerous insolvent corporations have been denied losses by the Commissioner in reorganizations like those involved in the cases at bar, upon the contentions of the Commissioner that the exchange of stocks of the new corporation for bonds of the old corporation, was actually a tax-free reorganization, and that therefore the bondholders did not sustain any loss by the exchange. The Commissioner so contended in the *Kitselman* case (C. C. A. 7) 89 F. (2d) 458, Cert. Den. 302 U. S. 709; in the *Burnham* case 33 B. T. A. 147, affirmed 86 F. (2d) 776, Cert. Den. 300 U. S. 683; in the *Rockford Brick & Tile Co.* case, 31 B. T. A. 537.

After the statute of limitations has barred all of such bondholders' rights to claim such losses, the Commissioner now seeks to shift his former position, which was that these cases were statutory reorganizations, which is only what the taxpayers are now claiming in the cases at bar. He

now wants to reverse his position, not so much, on that point, as on the practical argument that he can collect more taxes that way.

In the *Kitselman* case for example, in his brief before the Circuit Court of Appeals the Commissioner argues as follows, pages 17, 18 and 23:

> "Under these decisions, it is submitted, for reorganization purposes, a bondholder stands in no different position from a stockholder with respect to an interest in the assets and affairs of a corporation, and where, as in the present case, the bondholders were the only parties in interest in the assets of an insolvent corporation, a continuity of their (the bondholders) interest in the assets in the hands of a new corporation is a sufficient compliance with the requirements of the statute. That these bondholders were the only real parties in interest will be realized when it is observed that upon the foreclosure sale all the properties of the old corporation brought only '$430,000 free and clear of all liens and encumbrances, except the lien of any taxes, assessments, and water rents lawfully levied or assessed, and also the lien of the first mortgage securing the I. Ry. Co. bonds not in default' (R. 32-33) and that the defaulting bond issues under which these assets were sold amounted to the total sum of $3,989,000 (R. 31)."
>
> . . . . . .
>
> "It is also plain, we submit, that merely because one of the steps in the plan of reorganization as formulated and executed consisted of foreclosure proceedings and a judicial sale of the mortgaged assets prior to transfer to a new corporation formed for that purpose, such procedure will not defeat what may otherwise be regarded as a statutory reorganization. It will also be observed that this procedure was taken 'at the instigation of the committee, in pursuance of the plan and agreement' (R. 32). It has long been established that acquisition of assets through the medium of foreclosure proceedings does not of itself take the transfer out of reorganization provisions. *De Blois* v. *Commissioner*, 36 F. (2d) 11 (C. C. A. 1st); *C. H. Mead Coal*

Co. v. *Commissioner*, 72 F. (2d) 22 (C. C. A. 4th); *Securities Co.* v. *Commissioner*, 64 F. (2d) 330 (C. C. A. 2nd); *Shoenberg* v. *Commissioner*, 77 F. (2d) 446 (C. C. A. 8th). See also, *First National Bank of Champlain, N. Y.* v. *Commissioner*, 21 B. T. A. 415; *Rockford Dairy, Inc.* v. *Commissioner*, 26 B. T. A. 501."

* * * * *

"It is plain, we submit, in the present case that the foreclosure proceedings, the purchase of the assets of the old corporation by the bondholders' committee, and the transfer of the assets to a new corporation formed for that specific purpose, in exchange for stock and bonds of the new corporation, were all steps in a single plan of reorganization of the old corporation. It has long been established, in the application of the pertinent reorganization provisions, that the component steps of what may be regarded as a single or general plan looking to the reorganization of a corporation will not be treated separately."

In the same *Kitselman* case, the Government Brief filed in the Supreme Court, opposing the taxpayer's Petition for Certiorari, at pages 12 and 13, sets forth the following:

"Petitioner contends that there was no reorganization since neither the old C. S. B. & N. I. Ry. Company, nor its stockholders, acquired any interest in Northern Indiana Railways, Inc. We submit that where the corporation's liabilities greatly exceeded its assets, so that only bondholders participated in the reorganization, it is sufficient that the bondholders received a substantial interest in the new corporation in the form of common stocks and bonds. The only reason the stockholders did not participate in the plan was that their stock represented no assets and was valueless, and therefore they were without right to speak. See *In re 620 Church St. Corp.*, 299 U. S. 24, 27. While bondholders are ordinarily viewed merely as creditors, when the assets of the corporation in receivership are less than its obligations, the bondholders are for all practical purposes the corporation. All that remains for the stockholders is the corporate charter. Here it

is clear that the bondholders were the moving spirit in the reorganization and acted throughout as the owners in fact of the corporation's assets. The decision of the Court below gives practical and common sense recognition to a well-defined type of business reorganization."

This brief also stated at page 15:

"It has long been recognized that the acquisition of assets through the medium of foreclosure proceedings does not of itself take the transfer out of the reorganization provisions. *De Blois* v. *Commissioner*, 36 F. (2d) 11; *C. H. Mead Coal Co.* v. *Commissioner*, 72 F. (2d) 22."

Furthermore, as early as 1924, the Commissioner embodied these principles in a ruling in I. T. 2071, III-2 C. B. 34, where he, in referring to the comparable provisions of the 1918 and 1921 Acts, stated,

"The most common form of reorganization, especially in the case of defaulting corporations, is a reorganization in connection with an execution or foreclosure sale. It is often advisable for the bondholders of such corporation to formulate some scheme of reorganization and in order to consummate the reorganization they may enter into an agreement for this purpose, appoint a committee or other agent to represent them, to purchase the property at a foreclosure sale for their benefit, to form a new corporation and to transfer the property to it in return for stock or bonds or both. In the case of foreclosure, the reorganization takes place by procuring a sale under the mortgage, purchasing the property at the sale, and causing the same to be transferred to another corporation organized for that purpose by the bondholders. When the reorganization is through a foreclosure sale, stockholders need not be joined in the plan nor given the right to participate, and if they are given the right to participate it is purely a matter of favor."

The Commissioner appears to believe that the foregoing prinicples should operate in his favor whenever it suits his

purpose to urge them, overlooking the fact that they are rules of general application which apply, whether the results are favorable to him or to the taxpayer.

III.

The Reorganization in Our Case Was a Reorganization in Pursuance of Section 112 (b) of the 1928 Act, Under Paragraphs (3) or (4) of Said Section; Or Was a Tax-Free Controlled Exchange (Which Is Not Required to Be a Reorganization) Under Paragraph (5) of the Section.

The Commissioner in his brief in the *Southwest Consolidated* case, claims (and he claims the same in our case) that there was no reorganization and that he has a right to break the proceedings into steps, and to regard each step separately. He claims that the sale was a separate step, and that the price paid at the sale (or, under his new theory, the then value of the assets) is the controlling price and the basis to be used by the new corporation, instead of the cost or basis of the assets on the books of the old corporation. This assumes that the sale was not a part of a Plan of Reorganization. Yet in his petition for the Writ of Certiorari, in our case, the Commissioner states (page 2) under "Question Presented":

> "Pursuant to Plan, corporate assets were bought in by a creditor's committee at bankruptcy sale."

His brief in our case speaks of a "Plan". (P. 3) What plan? Why does the Commissioner omit the word "Reorganization" from "Plan"? It was not omitted from the Commissioner's brief filed in the Court below where on page 2, "Questions Presented", the Commissioner states:

> "The underlying question is whether the predecessor corporation, being insolvent, and its assets subject to sale in bankruptcy proceedings, for the benefit of creditors, the purchase and transfer of such assets, pursuant to a Plan of Reorganization, formulated and

executed by a majority of the creditors, involved the requisite continuity of a proprietary interest in the assets * * *."

Now, the Commissioner isolates one step—the sale—and chooses the $150,000.00 bid at the sale, instead of the basis of the old corporation on which the taxpayer had taken its depreciation and depletion. The fact is, as shown in our Statement, that this $150,000.00 figure was an arbitrary small amount selected with the approval of the Referee to limit his 1 per cent commission for services to a reasonable amount; and had nothing to do with the value of the assets. Further, in arguing that the single step, the sale, was the thing which fixed the cost of the assets, the Commissioner is forced to argue that there was no reorganization, that the findings of the Board of Tax Appeals that there was a reorganization and the affirming opinion of the Court below on that point, should be disregarded.

That similarly, must be disregarded all findings of the tribunals below, the documentary evidence, and the uncontradicted testimony in the case which show conclusively that from the very inception of the old corporation a reorganization had been planned. The sale itself was only one step in a series of steps in a completely planned reorganization set up months before the petition in bankruptcy was filed.

His argument forces the Commissioner to take another untenable position, namely, that the committee bought these assets for *itself*, ignoring the noteholders. In arguing that the committee was the purchaser and owner of the assets, and that its bid price at the sale governs, and that the transfer by the committee to the new corporation was an independent transaction or sale, the Commissioner overlooks the entire Plan of Reorganization (approved by the Court) covering a series of interdependent steps formulated to accomplish the final result of transferring the assets of the old corporation to the new, in exchange for

all of the latter's stock. The committee acquired them for that purpose under order of Court.

In passing, we may dispose of a point which the Commissioner argues at page 21 of his *Southwest Consolidated Corporation* brief. It does not apply in our case. He states in that brief that clause B of Section 112 (g) (1), is not applicable since it requires that the acquisition by the transferee corporation shall be *solely* in exchange for voting stock, but that cash for dissenters was also paid. The section of the law he there quoted is the 1934 Act which may be applicable in the *Southwest* case. It is not applicable to our case because our reorganization was in 1931 and therefore the 1928 law applies. The 1928 law was different. The 1934 law, Section 112 (g) (1), the relevant part of which is as follows:

> "The term 'reorganization' means (A) a statutory merger or consolidation or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock, of at least 80% of the voting stock and at least 80% of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation, * * *."

The corresponding section of the 1928 law is Section 112 (i) (1) the relevant part of which, reads:

> "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation or substantially all the properties of another corporation), * * *."

The 1934 law requires the issuing (new) corporation to issue *solely* voting stock for the properties of another corporation. The 1928 law contains no such requirement.

Further, in our case, the cash used by the creditors' committee was advanced by A. Iselin & Co. to the com-

mittee during the reorganization. Its repayment was assumed by the new corporation. If this be deemed an assumption of indebtedness of the old corporation, it does not affect the reorganization. The Act of June 29, 1939 which added paragraph (k) to Section 112, provides that where one party to a reorganization assumes a liability of another party, such liability shall be disregarded and not considered as money paid, and shall not affect the reorganization; and these provisions were also made retroactive through all the Revenue Acts back to the Revenue Act of 1924. Neither the Board nor the Court below found that the small amount of cash paid for expenses and to the two dissenters in our case affected the reorganization.

The facts in our case make it a reorganization as defined in paragraph (3) or (4) of Section 112 (b) or make it a tax-free controlled exchange as defined in paragraph (5) of that section of the Revenue Act of 1928. It falls under these definitions by being a merger or consolidation, or the acquisition by the new corporation of substantially all the properties of the old corporation. It may also qualify thereunder by being the acquisition by the old corporation (in effect through its representatives) of at least a majority of all of the stock of the new corporation. It may also qualify under the definition in paragraph (B), as being a transfer by the old corporation of all of its assets to the new corporation, because immediately after the transfer, the transferor (through its representatives, its noteholders) who were deemed to be stockholders, were in control of the new corporation.

We shall presently consider paragraphs (3) and (4). Let us first show that our transaction was a tax-free controlled exchange under paragraph (5) of Section 112 (b): Paragraph (5) does not require a transaction to be a reorganization at all, or to come under any of the definitions of a reorganization. Paragraph (5) requires only that property be transferred to a corporation by one or more

persons (here the old corporation or the noteholders through their committee), in exchange for stock or securities of the new corporation and immediately after the exchange such person or persons are in control of the corporation, (but in the case of two or more persons, the amount of securities or stock received by each must be substantially in proportion to his interest in the property prior to the exchange). That fits our case. In addition, if the notes held by the noteholders be considered as having been exchanged for the stock of the new corporation, then the notes, whatever their character as debts or claims, would qualify as "property", which was transferred to the new corporation, by one or more persons, in exchange for stock of the new corporation, and it was substantially in proportion to their interest in the property prior to the exchange. Many cases sustain our position:

In *Rockford Brick & Tile Co.* 31 B. T. A. 537, the Commissioner argued there was a tax-free exchange under paragraph (5) of Section 112 (B). He was successful and was upheld by the Board. In that case the facts were that *unsecured open accounts* of the old corporation were exchanged, through a creditor's committee, for stock of the new corporation and the creditors were in control of the new corporation after the exchange.

Similarly in the *Leckie case*, 37 B. T. A. 252, the Commissioner was successful in claiming the transaction to be a tax-free exchange under paragraph (5) where a creditor's committee, representing bondholders, bought the assets at foreclosure sale, and transferred the assets to a new corporation, and the bondholders received the stock and were in control of the new corporation.

We have already stated, and cited authorities to show that in tax cases the court looks at the substance, and not the form, of the transaction. This Court has held that where there is doubt, tax-laws are to be construed most

favorably to the taxpayer. *White* v. *Aronson* 302 U. S. 16; *Gould* v. *Gould*, 245 U. S. 151.

Coming now to paragraphs (3) and (4) of Section 112 (b), the decisions of the Board and of the Court below, in our favor, leave no doubt that our transaction was a reorganization under paragraphs (3) or (4). In view of the fact that the supporting decisions will probably be discussed thoroughly in the several briefs in the associated cases at bar, and in the oral arguments, we shall review only a few of them here.

In *Commissioner* v. *Kitselman*, 89 F. (2d) 458 (Cert. Den. 302 U. S. 709), the Commissioner urged that the transaction was a reorganization, in order to prevent a taxpayer from being allowed a loss on his defaulted mortgage bonds. The old corporation was insolvent. The Court found that the stock was valueless and that the stockholders for that reason did not participate in the new corporate stock. The Court also held that the bondholders in an insolvent corporation stepped into the place of the stockholders and superseded them. In that case there was a foreclosure by a bondholders' depositary committee, which, after purchasing the property, conveyed it to a new corporation in exchange for its securities, which were issued to the *bondholders* of the old corporation.

In the *Leckie case*, 37 B. T. A. 252, a bondholder's committee bought at foreclosure sale, real estate securing the bonds, and then transferred the property to a new corporation, in exchange for its stock. The *bondholders* and not the stockholders of the old corporation received the stock of the new corporation. The Commissioner urged, and the Board held that whether or not there was a reorganization under paragraph (3), there was at any rate a tax-free exchange, which did not have to be a reorganization, under paragraph (5) of Section 112 (b) because there was a transfer of property (bonds) to the new corporation for

its stock, and immediately thereafter, the bondholders were in control of the new corporation.

In *Burnham* v. *Commissioner*, 33 B. T. A. 147, affirmed by the Circuit Court of Appeals, in 86 F. (2d) 776 (Cert. Den. 300 U. S. 683), the Commissioner again in order to prevent a noteholder from being allowed a loss, contended and was successful in having the Board and the Court hold, that the transaction was a reorganization under paragraph (3) of Section 112 (b) of the 1928 Act. In this case, unsecured promissory notes due on or before ten years after date were exchanged for stock of a new corporation under a Plan of Reorganization. The Commissioner's contention that the notes were securities and that the issuance of the new corporation stock to the noteholders of the old corporation was a reorganization, were upheld by the Board and the Court.

In *Newberry Lumber & Chemical Co.* v. *Commissioner*, 94 F. (2d) 447, the old corporation being insolvent, defaulted on its mortgage bonds. A bondholders' committee purchased the assets at public sale, and paid for the mortgaged assets with the bonds, plus sufficient *cash* to pay the non-depositing bondholders and the expenses of the sale. (The facts on this point were like those in our case.) The Committee formed a new corporation to which it conveyed the assets in exchange for the stock and bonds of the new corporation. These new securities were distributed among the bondholders of the old corporation. The Commissioner claimed and the Board sustained him, that the basis of the new assets should have been the cost price paid by the committee at the Master's sale. The Appellate Court overruled this and held there was a reorganization under paragraphs (3), (4) and (5) of Section 112 (b) of the 1928 Act and that the new corporation could use as its basis the cost of the assets to the old corporation.

The *Newberry* case was followed in the case of *Mark Kleeden* v. *Commissioner*, 38 B. T. A. 821, in which stock-

holders of three corporations voted to transfer their assets to one man, who transferred them to a new corporation in exchange for its stock, which was delivered to the old corporation. The Commissioner claimed that the transaction should be divided into steps, but the Board overruled him and held it was a non-taxable reorganization. The Commissioner acquiesced in the decision of the Board (see 1939—1 C. B. 20).

In *Thurber* v. *Commissioner*, 84 F. (2d) 815, where after a reorganization plan had been approved by the stockholders of two corporations, it was changed and was still held to be a reorganization; the Court overruled the Board by holding that the Board had erroneously picked out a single step of a transaction which involved a series of steps, and had held that this step constituted a sale. The Court held that the transaction should have been viewed as a whole, and not as a transaction consisting of single steps.

In the *La Arcada* case, 35 B. T. A. 80, the Board held and cited decisions holding that the bid price at a public sale is not conclusive of the cost of depreciable property acquired in foreclosure or comparable circumstances.

In closing we call the Court's attention to the statement of the Government in its brief in the *Southwest Consolidated* case, at page 12:

> "Where a corporate transaction results in a continuation of an existing investment merely in a different form, it is understandable that the owners of that investment should be permitted to retain the same basis for tax purposes. Regulations 86, Article 112 (g)-1. (Appendix, *infra*.) That basis continues to reflect the investment cost of the properties still indirectly owned by the same persons."

That statement covers our case. The original investment of our noteholders in the old corporation was continued in a different form in the new corporation.

Conclusion.

We believe that the decision of the Circuit Court of Appeals affirming the decision of the Board should be affirmed.

Respectfully submitted,

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APPENDIX.

Revenue Act of 1928, c. 852, 45 Stat. 795:

Sec. 112. Recognition of Gain or Loss.

* * * * * *

(i) **Definition of reorganization.**—As used in this section and sections 113 and 115

(1) The term "reorganization" means (A) a merggr or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor, or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

* * * * * *

(j) **Definition of Control.**—As used in this section the term "control" means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation.

* * * * * *

(b) (3) **Stock for stock on reorganization.**—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(b) (4) **Same—Gain of corporation.**—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securi-

ties in another corporation a party to the reorganization.

(b) (5) **Transfer to corporation controlled by transferor.**—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(Note: Sec. 112 (i) (1) The definition of reorganization, above, was amended by Sec. 213 of the Revenue Act of 1939 to the effect that the assumption by the acquiring corporation of a liability of the other, or the fact that property acquired is subject to a liability shall be disregarded. See IRC Sec. 112.)

Sec. 113. Basis for Determining Gain or Loss.

(a) (7) **Transfers to corporation where control of property remains in same persons.**—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 80 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer;

(a) (8) **Same—Corporation controlled by transferor.**—If the property was acquired after December 31, 1920, by a corporation by the issuance of its stock or securities in connection with a transaction described

in section 112 (b) (5) (including, also cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made;

Sec. 114. Basis for Depreciation and Depletion.

(a) **Basis for depreciation**—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in Section 113 for the purpose of determining the gain or loss upon the sale or other disposition of such property.—

(b) **Basis for depletion**—

(1) **General Rule**—The basis upon which depletion is to be allowed in respect of any property shall be the same as is provided in Section 113 for the purpose of determining the gain or loss upon the sale or other disposition of such property, except as provided in paragraphs (2) and (3) of this subsection.

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SUPREME COURT OF THE UNITED STATES.

No. 328.—October Term, 1941.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Alabama Asphaltic Limestone Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 2, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent in 1931 acquired all the assets of Alabama Rock Asphalt, Inc., pursuant to a reorganization plan consummated with the aid of the bankruptcy court. In computing its depreciation and depletion allowances for the year 1934, respondent treated its assets as having the same basis which they had in the hands of the old corporation. The Commissioner determined a deficiency, computed on the price paid at the bankruptcy sale.[1] The Board of Tax Appeals rejected the position of the Commissioner. 41 B. T. A. 324. The Circuit Court of Appeals affirmed. 119 F. 2d 819. We granted the petition for certiorari because of the conflict between that decision[2] and *Commissioner* v. *Palm Springs Holding Corp.*, 119 F. 2d 846, decided by the Circuit Court of Appeals for the Ninth Circuit and *Helvering* v. *New President Corp.*, 122 F. 2d 92, decided by the Circuit Court of Appeals for the Eighth Circuit.

The answer to the question[3] turns on the meaning of that part of § 112(i)(1) of the Revenue Act of 1928 (45 Stat. 791, 818) which provides: "The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of . . . substantially all the properties of another corporation. . . ."

[1] Petitioner now takes the position that the new basis should be measured by the market value of the assets rather than the bid price. See Bondholders Committee v. Commissioner, No. 128, decided this day.

[2] And see Commissioner v. Kitselman, 89 F. 2d 458, and Commissioner v. Newberry Lumber & Chem. Co., 94 F. 2d 447, which are in accord with the decision below.

[3] If there was a "reorganization", the respondent was entitled to use the asset basis of the old corporation as provided in § 113(a)(7).

The essential facts can be stated briefly. The old corporation was a subsidiary of a corporation which was in receivership in 1929. Stockholders of the parent had financed the old corporation taking unsecured notes for their advances. Maturity of the notes was approaching and not all of the noteholders would agree to take stock for their claims. Accordingly a creditors' committee was formed late in 1929 and a plan of reorganization was proposed to which all the noteholders, except two, assented. The plan provided that a new corporation would be formed which would acquire all the assets of the old corporation. The stock of the new corporation, preferred and common, would be issued to the creditors in satisfaction of their claims. Pursuant to the plan involuntary bankruptcy proceedings were instituted in 1930. The appraised value of the bankrupt corporation's assets was about $155,000. Its obligations were about $838,000, the unsecured notes with accrued interest aggregating somewhat over $793,000. The bankruptcy trustee offered the assets for sale at public auction. They were bid in by the creditors' committee for $150,000. The price was paid by $15,000 in cash, by agreements of creditors to accept stock of a new corporation in full discharge of their claims, and by an offer of the committee to meet the various costs of administration, etc. Thereafter respondent was formed and acquired all the assets of the bankrupt corporation. It does not appear whether the acquisition was directly from the old corporation on assignment of the bid or from the committee. Pursuant to the plan respondent issued its stock to the creditors of the old corporation—over 95% to the noteholders and the balance to small creditors. Nonassenting creditors were paid in cash. Operations were not interrupted by the reorganization and were carried on subsequently by substantially the same persons as before.

From the *Pinellas* case (287 U. S. 462) to the *Le Tulle* case (308 U. S. 415) it has been recognized that a transaction may not qualify as a "reorganization" under the various revenue acts though the literal language of the statute is satisfied. See Paul, Studies in Federal Taxation (3d Series), pp. 91 *et seq.* The *Pinellas* case introduced the continuity of interest theory to eliminate those transactions which had "no real semblance to a merger or consolidation" (287 U. S. p. 470) and to avoid a construction which "would make evasion of taxation very easy." *Id.* p. 469. In that case the transferor received, in ex-

change for its property cash and short term notes. This Court said (*id.* p. 470) "Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes." In the *Le Tulle* case, we held that the term of the obligation received by the seller was immaterial. "Where the consideration is wholly in the transferee's bonds, or part cash and part such bonds, we think it cannot be said that the transferor retains any proprietary interest in the enterprise." 308 U. S. pp. 420-421. On the basis of the continuity of interest theory as explained in the *Le Tulle* case it is now earnestly contended that a substantial ownership interest in the transferee company must be retained by the holders of the ownership interest in the transferor. That view has been followed by some courts. *Commissioner* v. *Palm Springs Holding Corp.*, *supra*; *Helvering* v. *New President Corp.*, *supra*. Under that test there was "no reorganization" in this case since the old stockholders were eliminated by the plan, no portion whatever of their proprietary interest being preserved for them in the new corporation. And it is clear that the fact that the creditors were for the most part stockholders of the parent company does not bridge the gap. The equity interest in the parent is one step removed from the equity interest in the subsidiary. In any event, the stockholders of the parent were not granted participation in the plan *qua* stockholders.

We conclude, however, that it is immaterial that the transfer shifted the ownership of the equity in the property from the stockholders to the creditors of the old corporation. Plainly the old continuity of interest was broken. Technically that did not occur in this proceeding until the judicial sale took place. For practical purposes, however, it took place not later than the time when the creditors took steps to enforce their demands against their insolvent debtor. In this case, that was the date of the institution of bankruptcy proceedings. From that time on they had effective command over the disposition of the property. The full priority rule of *Northern Pacific R. Co.* v. *Boyd*, 228 U. S. 482, applies to proceedings in bankruptcy as well as to equity receiverships. *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106. It gives creditors, whether secured or unsecured, the right to exclude stockholders entirely from the reorganization plan when the debtor is

insolvent. See *In re 620 Church St. Bldg. Corp.*, 299 U. S. 24. When the equity owners are excluded and the old creditors become the stockholders of the new corporation, it conforms to realities to date their equity ownership from the time when they invoked the processes of the law to enforce their rights of full priority. At that time they stepped into the shoes of the old stockholders. The sale "did nothing but recognize officially what had before been true in fact." *Helvering* v. *New Haven & S. L. R. Co.*, 121 F. 2d 985, 987.

That conclusion involves no conflict with the principle of the *Le Tulle* case. A bondholder interest in a solvent company plainly is not the equivalent of a proprietary interest, even though upon default the bondholders could retake the property transferred. The mere possibility of a proprietary interest is of course not its equivalent. But the determinative and controlling factors of the debtor's insolvency and an effective command by the creditors over the property were absent in the *Le Tulle* case.

Nor are there any other considerations which prevent this transaction from qualifying as a "reorganization" within the meaning of the Act. The *Pinellas* case makes plain that "merger" and "consolidation" as used in the Act includes transactions which "are beyond the ordinary and commonly accepted meaning of those words". 287 U. S. p. 470. Insolvency reorganizations are within the family of financial readjustments embraced in those terms as used in this particular statute. Some contention, however, is made that this transaction did not meet the statutory standard because the properties acquired by the new corporation belonged at that time to the committee and not to the old corporation. That is true. Yet the separate steps were integrated parts of a single scheme. Transitory phases of an arrangement frequently are disregarded under these sections of the revenue acts where they add nothing of substance to the complete affair. *Gregory* v. *Helvering*, 293 U. S. 465; *Helvering* v. *Bashford*, 302 U. S. 454. Here they were no more than intermediate procedural devices utilized to enable the new corporation to acquire all the assets of the old one pursuant to a single reorganization plan.

Affirmed.

Mr. Justice ROBERTS did not participate in the consideration or decision of this case.